TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 506

THE UNITED STATES OF AMERICA, EX REL. MAY JOHNSON, PETITIONER,

vs.

W. FRANK WATKINS, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE IN THE NEW YORK DISTRICT, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 12, 1949.

CERTIORARI GRANTED MARCH 7, 1949.

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United States Circuit Court of Appeals

For the Second Circuit

1

UNITED STATES OF AMERICA, EX REL., MAY JOHNSON,

Relator-Appellant,

against

W. FRANK WATKINS, District Director of the Immigration and Naturalization Service in the New York District, or such other person, if any, who may have the custody of MAY JOHNSON,

Respondent-Appellee. 2

Statement Under Rule 15

This is an appeal from an order of the Honorable Simon H. Rifkind, United States District Judge, entered on July 6, 1948, in the office of the Clerk of the United States District Court for the Southern District of New York, dismissing a writ of habeas corpus, issued April 21, 1948.

No hearing was held on said writ. This appeal from the aforesaid order was taken on July 23, 1948. 3

The original attorney of relator was Mr. Haskell R. Barst. Gunther Jacobson, Esq., of 36 West 44th Street, New York City, was substituted as attorney prior to re-argument had before Judge Rifkind. There was no other change of parties or attorneys.

Writ of Habeas Corpus

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

To: W. F. WATKINS, District Director of the Immigration and Naturalization Service in the New York District, or such other person, if any, who may have the said MAY JOHNSON in custody:

WE COMMAND YOU, that you have the body of MAY JOHNSON, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name she shall be called or charged, before one of the Judges of the United States District Court in and for the Southern District of New York, on the 27 day of April, 1948, at 10:30 o'clock in the forenoon of that day, in the United States Courthouse, Room 506, located on Foley Square, in the Borough of Manhattan, City and State of New York, to do and receive all and singular those things which the said Judge shall then and there consider of you in this behalf and have you then and there this writ.

WITNESS: Hon. JOHN C. KNOX, Judge of the United States District Court for the Southern District of New York, at New York, N. Y., in said district this 21 day of April, 1948.

WILLIAM V. CONNELL,
Clerk.

WRIT ALLOWED 4/21/48.

HENRY W. GODDARD,
U. S. D. J.

Petition for Writ of Habeas Corpus

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

To the Honorable Judge of the District Court of the United States for the Southern District of New York:

The petition of Inga Obum shows that she is a legal permanent resident of the United States and resides at No. 145 West 73rd Street, in the Borough of Manhattan, City and State of New York, and that she is a friend of May Johnson and is duly authorized by said May Johnson to make this application.

That the said May Johnson is now imprisoned and detained by the Immigration and Naturalization Service at Ellis Island, New York Harbor, and restrained in her liberty, and the Immigration and Naturalization Service has scheduled her deportation from the United States to Sweden on the SS. Gripsholm on April 23rd, 1948.

That upon information and belief, the said May Johnson is not imprisoned, committed or detained by virtue of any process or mandate issued by any Court of the United States, or by any Judge thereof, nor is she imprisoned, committed or detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or the final order of such a tribunal made in a special proceeding instituted for any cause except to punish her for contempt; nor by virtue of an execution or other process issued by such judgment, decree or final order.

That the said May Johnson has been in detention at Ellis Island since March 1st, 1948, but has been the sub-

10 *Petition for Writ of Habeas Corpus*

ject of proceeding which terminated by an order of the Board of Special Inquiry dated April 6th, 1948, and the refusal of the General Office of the Immigration and Naturalization Service to review such order on April 19th, 1948. There was, therefore, no earlier opportunity to apply for this writ of habeas corpus.

That the cause or pretense of the imprisonment or restraint and the threatened impending deportation, according to the best knowledge and belief of your petitioner, is that the Immigration and Naturalization Service contends
11 that May Johnson is mandatorily excludable from the United States by reason of an order of the Board of Special Inquiry at New York which is, in effect, a final order from which there is no appeal allowed in accordance with the regulations of the Immigration and Naturalization Service. My attorney has examined the files of the Immigration Service and has informed me of its contents.

The facts and circumstances in this matter, to the best knowledge of your petitioner, are as follows: May Johnson is an unmarried young woman in her early thirties. Prior to her departure from Sweden in February of this year, she had a responsible position in the Swedish film in-
12 dustry. She had never been confined to any institution for any mental disorder. She secured a quota immigration visa at the American Consulate in Stockhold and, I am told, that she was given a physical examination at that time. She arrived in New York on March 1st, 1948, ex SS Stockhold of the Swedish American Line and was taken into custody for examination by the Public Health Service at Ellis Island. It appears that while enroute to the United States on the SS Stockhold she became ill and was treated by the Ship's doctor, one Dr. Gunnar Malmsten. A report was filed with the Immigration Service by Dr. Malmsten upon the arrival of the SS Stockhold as a result of

which she was held for examination by the Public Health Service.

Information furnished by Miss May Johnson indicates that her illness aboard ship was in the nature of physical exhaustion brought about by the excitement of her departure from Sweden for the United States. Also, from the information furnished to me, it may be that the ship's doctor misconstrued the nature of an illness from which the alien suffered several years ago while in Sweden. Since the ship's doctor filed his report, I have personally spoken with him and he has volunteered the opinion that the alien is not suffering from any mental disorder.

The fact is, however, that physicians of the Public Health Service examined the alien and issued what is known as a "Class A Medical Certificate" on the grounds that the alien is a mental defective. I understand that the issuance of such certificate results in mandatory exclusion from the United States. It is of interest to note that, in behalf of the alien, I retained Dr. Carleton Simon, a prominent psychiatrist and neurologist of New York City, to examine the alien and render his report to the Public Health Service. Dr. Simon made such examination and rendered a report in which he stated, in substance, but quite emphatically that the alien is not psychotic and is not mentally defective.

The Public Health Service has ignored the report of Dr. Simon and has adhered to its original report stating that the alien is a mental defective.

I am informed that a request has been made to the Central Office of the Immigration Service for a review of the order of the Board of Special Inquiry but that such request has been refused.

I believe that the findings of the Public Health Service have been based upon a misunderstanding of the report of

the ship's doctor who now states that in his opinion the alien is not mentally defective and more particularly upon the fact that the alien who speaks little English did not understand the questions put to her by the Public Health physicians and the latter probably obtained the wrong impression. I am told that the "Class A Medical Certificate" is for the most part based upon the oral examination of the alien rather than upon any affirmative medical findings.

The said May Johnson contends that she is not mentally defective and that she is not, therefore, subject to ex-
17 clusion and deportation and that the Immigration and Naturalization Service has no legal justification to effect her deportation from the United States, or to hold her in custody and restrain her in her liberty. Your petitioner believes that the said May Johnson was imprisoned, committed or detained, as herein stated, without reason or justice and without her consent and against her wishes and protest.

No previous application for the relief herein sought has been made.

WHEREFORE, your petitioner prays that a Writ of Ha-
18 beas Corpus issue directed to W. F. Watkins, District Director of the United States Immigration and Naturalization Service at New York, 70 Columbus Avenue, in the Borough of Manhattan, City and State of New York, commanding him to produce the said May Johnson before a Justice of this Court.

Dated, New York, N. Y.
April 21st, 1948.

INGA OBUM,
Petitioner.

(Verified by Inga Obum, petitioner, on April 21st, 1948.)

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Return to Writ of Habeas Corpus

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civil 45-577

[SAME TITLE]

SOUTHERN DISTRICT OF NEW YORK, ss.:

20

LESTER FRIEDMAN, being duly sworn, says that he is and during all the times herein mentioned has been an attorney in the service of the United States Department of Justice, Immigration and Naturalization Service, attached to the office of the District Counsel, New York District; that in his official capacity he is authorized to make and in behalf of the respondent hereby makes the following return to the writ of habeas corpus herein.

In compliance with the direction of this Court, the body of the said alien in his own proper person is produced herewith before this Court at the time specified in the writ.

21

It is respectfully urged that upon its face the petition upon which the writ was granted is insufficient in law, and that the writ should therefore be quashed because

(a) The petition does not allege facts to show that the proceedings of the Department of Justice upon which was issued the order of exclusion pursuant to which the said alien was held, were not regular, fair and in compliance with the statute applicable in such cases, nor facts from which this Court can determine that the proceedings were either irregular, unfair or not in compliance with said statute;

22 *Return to Writ of Habeas Corpus*

(b) The petition does not allege any facts which entitled this Court to review the findings and conclusion of the Department of Justice upon which the order of exclusion was issued;

(c) It is not alleged that there was no evidence before the Department of Justice upon which it based or could have based its findings and conclusion in accordance with which the order of exclusion was issued;

(d) It does not appear by allegation of facts that the
23 issues sought by the petition now to be litigated in this Court have not already been determined by the Department of Justice adversely to the said alien in proceedings which were regular, fair and in compliance with the statute applicable thereto.

As appears by the records of the Department of Justice of the United States with respect to the above-named alien, which records are incorporated herein by reference.

1. Relator, May Gunborg Johnson, is a 33 year old female native and citizen of Sweden who last arrived at the Port of New York on the S.S. "Stockholm" on March 1, 1948 for permanent residence.

24 2. On March 16, 1948, and on April 6, 1948, relator was accorded a hearing before a Board of Special Inquiry, Immigration and Naturalization Service, at the conclusion of which she was excluded from admission to the United States in that she had been certified by surgeons of the United States Public Health Service to be mentally defective, Class A. A photostatic copy of the hearing is attached hereto and made a part hereof.

Return to Writ of Habeas Corpus

3. Upon appeal to a Board of Medical Officers, United States Public Health Service, the original certification was affirmed.

4. Relator is presently detained at Ellis Island, New York Harbor, New York, by the Immigration and Naturalization Service under the above-mentioned order of exclusion.

WHEREFORE, it is prayed that the writ of habeas corpus be dismissed and the alien be remanded to the custody of the Immigration and Naturalization Service.

Dated: New York, N. Y., May 28, 1948.

LESTER FRIEDMAN.

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Minutes of Hearing of Board of Special Inquiry March 16, 1948

BEFORE A BOARD OF SPECIAL INQUIRY

HELD AT

70 Columbus Ave., New York, N. Y.

Present:

INSP. EDW. A. CLARK, Chmn.
INS. RUSSELL DANIELSON
SECY. A. P. FAIRBANKS
29 Swedish Interpreter K. R. Helander

JOHNSON, May Gunborg
33 F Swedish Scand.

0300/221545

Arr NY S Stockholm, Swedish-American Line, March 1 ,1948

Sec 3 Act of 1917; Dlvd EI 3/1/48 1 P.M., EI Hosp. 3/1/48 2 PM; From Hosp. 3/12/48 2 PM

30

Made SI from TD 3/12/48 5 PM C. R. Challandes

Chairman to applicant who testified through interpreter in Swedish?

Q. What is your name? A. May Gunborg Johnson.

Q. You are informed that you have been referred to this board of special inquiry to be heard on your application for admission to the United tates, the burden of proof being upon you to establish that you are not inadmissible under any provision of the Immigration laws. Do you understand? A. Yes.

Q. You may have present at this proceeding counsel of your own selection at your own expense which counsel may be an attorney at law or other person authorized to practice before this service. You may also have present a friend or relative provided if that friend or relative is to appear as a witness your testimony must first have been completed. Do you wish to have counsel present? A. No.

Q. Do you wish to have a friend or relative present? A. No.

Q. Please rise and raise your right hand to be sworn. (complies) Do you solemnly swear that the testimony you will give this board will be the truth, the whole truth and nothing but the truth, so help you God? A. Yes.

Q. You are warned if you give false testimony at this proceeding you may be prosecuted for perjury and upon conviction be liable to a penalty of five years in a penitentiary and a fine of $2,000. Do you understand? A. Yes.

Q. You have stated your name to be May Gunborg Johnson, is that your full true and correct name? A. Yes.

Q. Is that the name given to you at birth? A. Yes.

Q. Have you ever used or been known by any other name? A. No.

Q. How old are you? A. 33 years.

Q. Of what country are you a citizen or subject? A. Sweden.

Q. Of what race of people are you? A. Scandinavian.

Q. When and where were you born? A. I was born in Falkenberg, Sweden, May 27, 1914.

Q. What is your marital status? A. Single.

Q. Are you traveling alone? A. Yes.

Q. Did you last arrive in the United States at the port of New York on the SS Stockholm on March 1, 1948 embarking at Goteborg on February 21, 1948? A. Yes.

34 *Minutes of Hearing of Board of Special Inquiry*
March 16, 1948

Q. What was your last residence abroad? A. St. Eric Street, Stockholm, Sweden.

Q. Who is your closest relative abroad? A. My mother Clara Johnson and my father Axel Johnson.

Q. Do you read? A. Yes.

Q. What is your occupation? A. I worked for moving picture concern in Stockholm as a film salesman.

Q. Have you ever been previously in the United States? A. No.

35 Q. Who paid your passage? A. I did.

Q. What is your destination? A. I am going to Paul Corbett, Brinker Road, Barrington, Illinois, to work in his home.

Q. What funds do you have? A. I have a check for $100 and $35 in currency at the Treasurer's Office at Ellis Island.

Q. Do you have a ticket or transportation anywhere? A. No.

Q. What is your purpose in coming to the United States and how long will you remain? A. To remain permanently.

36 Chairman: For the applicant there is presented Swedish Passport #L0422 issued on October 5, 1945 at Stockholm and valid to October 5, 1950. There is also presented immigration Visa and Alien Registration, Immigration Visa #1655 issued by the American Foreign Service at Stockholm on February 4, 1948 in the name of the applicant as a Swedish non-preference immigrant. Visa expires four months from the date of issue. Bears the signature of Carl Birkeland, Counsel.

Q. Have you ever been debarred or deported from the United States? A. No.

Q. Have you ever been arrested in any country? A. No.

Q. Are you in good health? A. Yes.

Chairman to board members: There has been issued Medical Certificate #380, Ellis Island, March 11, 1948; in the name of May G. Johnson who arrived on the S.S. Stockholm on March 1, 1948, certifying that she
Exhibit #1 has been examined and found to be afflicted with mental defective, Class A. Said certificate bears the signature of C. W. Mangun, Surgeon and B. Pasquarelli, Surgeon. Such certificate will be attached to the record of hearing and identified as EXHIBIT #1.

There is also attached to the file medical chart relating to the applicant and dated on the face February 1948 and indicating that the applicant occupied Stateroom #82 on the SS Stockholm and bearing the
Exhibit #2 notation at the top "Insania". The reverse side thereof bears typewritten report in Swedish relating to three days February 23, 24 and 29, 1948; there appears a hand written notation at the top of such report as follows: "Special Attention U.S.P.H.S. Ellis Island Hospital." Such report and a translation thereof will be attached to the record of hearing and identified as EXHIBIT #2.

Chairman to applicant:

Q. Have you any comment to make on either the Medical Certificate or the report which I show you? A. I would like

to call attention to what the medical report says on February 24th that I had stated that I had been treated at home for insanity or mental illness. That I deny. I have never been treated for insanity. And also as regards giving false information to the consul, I have no recollection of saying anything of that kind. When I went to the consul the only thing he asked me was to swear to the correctness of the answers given in the visa application and there was no information given by me other than swearing to the truth of those answers.

Q. You are advised that the certification entered in your case renders you mandatorily excludable in so far as this board is concerned, from which exclusion there is no appeal. However, you may appeal from the certificate issued by the Public Health Service to a medical board to be convened by the Public Health Service at which time you may be represented by a physician of your own selection to give testimony in your behalf. Do you wish to appeal to such a board? A. Yes I wish to appeal.

Chairman to board members: Motion to defer for appeal to a medical board is in order.

By Inspector Danielson: I move to defer for appeal to a medical board.

By Secretary Fairbanks: I second the motion.

Chairman: Unanimous.

I certify the foregoing consisting of four pages to be a true and correct transcription of the stenographic notes recorded by me.

A. P. FAIRBANKS,
A. P. Fairbanks, Secy.

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Minutes of Hearing of Board of Special Inquiry
April 6, 1948

BEFORE A BOARD OF SPECIAL INQUIRY

Held at 70 Columbus Ave., New York, N. Y.

JOHNSON, May Gunborg
33 F Swedish Scandinavian

44

April 6 1948 3:45 P. M.

Present:

INSP. EDW. A. CLARK, Chmn.,
INSP. H. A. MINTZER,
SECY. A. P. FAIRBANKS.
Swedish Interpreter K. R. HELANDER.

Counsel: HASKELL R. BARST
60 Broad Street
New York 4, N. Y.

45

0300/221545

Arr SS Stockholm, Swedish American Line, March 1 1948

DEFERRED APF-152 March 16 1948; Minutes of previous hearing made a part of this record.

By Inspector Mintzer: I have familiarized myself with the record in this case.

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April 6, 1948

Chairman to applicant who testified through interpreter in Swedish:

Q. What is your name? A. May Gunborg Johnson.

Q. Were you before a board of special inquiry on March 16 1948 on which occasion hearing was deferred to permit you to appeal to a medical board? A. Yes.

Q. You are advised that the oath that was administered to you on that occasion will continue in effect today. Do you understand? A. Yes.

47 Q. You are advised that this board is in receipt of a report from the Federal Security Agency, U. S. Public Health Service, U. S. Marine Hospital, Ellis Island, N. Y., dated March 26 1948, addressed to the District Director of this Service, referring to you and indicating that a Board of Medical Officers has considered your appeal and taking into consideration the certificate of March 11 1948 and the testimony given by Dr. Carlton Simon, with the result that it concurs with the certificate of March 11 1948. Such report bears the signature of J. Zinkin, Surgeon; F. D. Regan, Surgeon; and P. Lawler, Assistant Surgeon. Such report will be attached to the record of hearing and identified as

48 Exhibit #3.

I show you this report and ask you if you have any comment to make?

By counsel: No comment.

Chairman to applicant:

Q. Do you have any relatives in the United States? A. Yes, my aunt, Mrs. Olga Linstrum, 1346½ North Hayworth Avenue, Hollywood 46, California; and my cousin, Ethelle Wollz, 450 North Rosmore, Apartment 102, Los Angeles, California and her husband, Mr. Herman Wollz, 1450 Broadway, New York City.

Q. Do any of your relatives know that you have arrived in the United States? A. Yes, they do know.

By Counsel: All of her relatives know of her arrival, in fact, they have retained me in this case.

Chairman to applicant:

Q. Are your relatives in a position to maintain you in the United States should you gain entry and should that be necessary? A. Yes.

Q. Have you the present intention of marrying in the immediate future should you gain entry into the United States? A. No. 50

Q. You are advised that the certificate issued by the U. S. Public Health Service, which certificate has been affirmed by the Board of Medical Officers of the U. S. Public Health Service, renders you mandatorily excludable from the United States from which exclusion there is no appeal. Do you understand? A. Yes.

Q. Who is the Paul Corbett to whom you were destined in the United States? A. A friend of mine.

Q. What is the nature of your acquaintanceship with him? A. He is a friend of my friends and I am going to work for him. 51

Q. Is there a place in his home for you to live? A. Yes, he owns his own home worth approximately $25,000.

Q. Who is living in that home at the present time? A. His wife and two children and Mr. Corbett.

Q. Were you destined to Mr. Corbett to act as a domestic in his home or to care for his children? A. Just to help in the home.

Q. Have you ever met Mr. Corbett? A. No.

Chairman to counsel:

Q. Counsel, do you wish to question the applicant? A. Yes, I wish to ask her a few questions.

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April 6, 1948

Counsel to applicant:

Q. Have you or any of your friends or relatives requested the issuance or delivery to you of certificates of Swedish doctors who may have treated you prior to your departure from Sweden? A. Yes, my friend, Mrs. Obum, has written to doctors in Sweden.

Q. Have you received such statements from those doctors? A. Yes, I have heard that Mrs. Obum has received such information from my mother in Sweden.

53 Q. Do you wish to have an opportunity to submit such certificates? A. Yes.

Q. Do you wish that the Central Office of the Immigration Service review, if possible, the findings of the Board of Special Inquiry? A. Yes.

By counsel: Now I would like to make a statement for the record: First, I do request that this board furnish me with a copy of the record in this case as the alien's attorney. I furthermore request, if possible, that the Central Office of this Service review the findings of this board of special inquiry and in this connection I submit that from an exam-
54 ination of the record it appears that the only positive finding of mental defectiveness appears in the record of the ship's surgeon; and that the report of the Public Health doctor is, apparently, primarily based upon the report of the ship's surgeon; and I wish to call the attention of this board and the Central Office to the examination made by Dr. Carlton Simon, a qualified psychiatrist, and the report which he rendered and in which he states that in his opinion this alien is not psychotic and is not suffering from mental disturbance whatsoever. I wish to call the attention of this board and the Central Office also, to the fact that during the confinement of this alien at

55

Ellis Island she has deported and conducted herself in a normal and sane manner and has given no indication whatsoever of any mental disturbance; and I ask, in behalf of this alien, for the opportunity to produce further medical testimony of private psychiatrists and to furnish reports of Swedish physicians, who may have examined her prior to her departure from Sweden, as to her past physical and mental history.

56

Chairman to counsel:

Q. If pursuant to your request it should be ordered that the applicant should be continued in detention pending the receipt of reports requested by you, is the applicant in a position to bear the expense of her continued detention if such should be necessary? A. I believe so, but in response to that question I respectfully request that if she is given the opportunity to submit further reports of her Swedish physicians, that she be released by the Central Office under parole or bond or whatever other conditions they may impose.

57

Chairman to board members: Are there any further questions?

By Inspector Mintzer: I have none.

By Secy. Fairbanks: I have none.

Chairman: On the evidence adduced in this case I propose the following findings of fact and conclusions of law:

FINDINGS OF FACT:

1) that you are an alien a native and citizen of Sweden;

2) that you last arrived in the United States at the port of New York on March 1 1948 on the SS Stockholm;

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April 6, 1948

3) that you are an applicant for admission to the United States for permanent residence;

4) that you are in possession of valid Swedish passport;

5) that you are in possession of an unexpired quota immigration visa;

6) that there has issued in your case medical certificate certifying you to be "Mental Defective, Class A" which certificate has been affirmed by a board of medical officers pursuant to your appeal to such a board.

59

CONCLUSIONS OF LAW: That you are inadmissible to the United States under Section 3 of the Immigration Act of February 5 1917 in that you have been certified by surgeons of the U. S. Public Health Service to be mentally defective, Class A.

By Inspector Mintzer: I concur.
By Secretary Fairbanks: I concur.

60

Chairman to applicant:

Q. Have you understood the findings of fact and conclusions of law arrived at and read to you? A. Yes.

Chairman: Motion is in order.

By Inspector Mintzer: MOTION: On the basis of the findings of fact and conclusions of law I move to exclude the applicant from admission to the United States.

By Secretary Fairbanks: I second the motion.
Chairman: Unanimous.

Minutes of Hearing of Board of Special Inquiry
April 6, 1948

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Chairman to applicant:

Q. You are advised that this board has voted to exclude you from admission to the United States and from this decision there is no appeal. Do you understand? A. Yes.

Q. If you are ordered deported from the United States you will be returned to the country whence you came at the expense of the transportation company that brought you here in like accommodations; and for a period of one year thereafter it will be unlawful for you to enter or attempt to enter the United States unless prior to your embarkation at a foreign port you have received permission of the Attorney General of the United States to reapply for admission to the United States. Do you understand? A. Yes.

62

Q. When and where did you purchase your transportation for this voyage and what was its cost? A. The ticket cost 802.80 Crowns and I bought it at the Swedish American Line Office in Stockholm, February 17, 1948.

Q. Were you at any time prior to embarkation examined by a physician on behalf of the transportation company that brought you here? A. None other than I presented my vaccination certificates.

Q. Had you been examined by a physician and questioned concerning your past personal history would you have told the examining physician the truth? A. Yes.

63

Q. You are advised that the Attorney General in his discretion may order return of your passage money. Do you understand? A. Yes.

FINE NOTICE ISSUED IN THIS CASE.

4:35 PM

I certify the foregoing consisting of nine pages to be true and correct transcription of the stenographic notes recorded by me.

A. P. FAIRBANKS.

A. P. Fairbanks, Secy.

64

Exhibit 1, Medical Certificate

Ellis Island, N. Y.
Station March 11, 1948

Name JOHNSON, MAY G.

Age 33 Sex Female

Nat. Sweden Race White

Date arrival 3/1/48

S.S. Stockholm

65 Class..... Manifest No.....

This is to certify that the above-described person has this day been examined and is found to be afflicted with—

MENTAL DEFECTIVE

Class "A"

B. PASQUARILLI, S. A. Surgeon.
C. W. MANGUN, Surgeon.

66

67

Exhibit 2, Statement of Ship's Doctor

Translation #2006

Year 1948 D: Insania
Month—February.

FEVER CHART

Name: Maj Jonsson, born April 27th, 1914—Swedish citizen, Cabin 82 H: Stockholm.

(Temperature is shown as bein 37° on Feb. 23, 1 point less on Feb. 25th and Feb. 29th)

2/23/48 Stating that she could not stand the sea, the patient would not go to the dining room, would only lie down, said she could not get up, became dizzy and felt weak. The waitress yesterday asked that food be brought to the cabin. The impression when visiting the cabin yesterday was that of a seasick person, but today the patient states that she feels herself persecuted—everybody looks at her. She also admits hallucinations. Has difficulty in sleeping. Hears cries, but does not know who it is crying. Sees "faces", don't know who they are, sees them only at night. Feels herself hunted. Tells that she gave wrong information to the Consul when obtaining her visa and thinks herself very sinful. 68 69

As one here has the impression of an incipient psychosis, it is decided to transfer the patient to the isolation ward of the ship's hospital.

Stat.: A rather pale woman of 33 years of asthenic physique. No "incompensation" indications.

Throat: O Lungs: O Cor: O Abdomen: O

Exhibit 2, Statement of Ship's Doctor

2/24 The patient reveals that she was treated at home for insanity by a doctor for a half year, two years ago. State that during the last week, she has progressively felt more and more strangely. Is going to America to work for a man by name of Corbett in Ill.? A cousin and a friend is said to live in New York. Her friend would meet her when she arrived.

In the evening she becomes agitated and restless, and it becomes necessary to calm her with Mo-sc. She again says that she is sinful and that it was just as well if she could die. Thinks nobody wants anything to do with her.

2/29 During the whole time it has been necessary to care for her and feed her, has on several occasions refused to eat. Has been apathetic, lying down and dozing, and not shown interest in anything. Not strong enough to do anything, she says. Not strong enough to read.

Today in the afternoon the patient clears up remarkably. Says she has no recollection of a lot of strange thing she had said before. Slept well last night. Eats by herself (without help) Denies having any hallucinations. Looks considerably better.

The above translation from the Swedish language was made by the undersigned.

K. R. HELANDER
Interpreter

Immigration & Naturalization Service
Mar 16 1948

Exhibit 2, Statement of Ship's Doctor
(Swedish Translation)

SPECIAL ATTENTION KSPAS
ELLIS AND HOSPITAL

23.2.48: Under uppgivande att hon ej tålde sjön ville pat. ej gå till matsalen ville bara ligga sade sig ej kunna gå upp, blev yr och kände sig svag. Uppsasserskan begärde i går bång för mat till hytte. Man fick vid besök i hytten i går intrycket av en sjösjuk person, men i dag meddelar pat. att hon känner sig förföljd- alla människor tittar på henne. Hon medger även hallucinationer. Har svårt att sova. Hör skrik. Men vet inte vem som skriker. Ser " gubbar", vet inte vilka de äro och hon ser dem bara på nätterna. Känner sig jagad. Talar om att hon lämnat felaktiga upplysningar till konsuln i gid erhållande av visum och tycker att hon är mycket syndig.

Då man här har intrycket av en uppseglande psykos bestämmer man sig för att överföra pat. till issoleringsrummet på sjukavdelningen

Stat. : En asthenisk byggd, kx rätt blek 33 årig kvinna. Inga inkompensationstecken.
Svalg: 0 Pulm: 0 Cor: 0 Buk: 0.

24.2: Pat. talar om att hon skulle ha skötts i hemmet för sinnessjukdom under ett halvår för 2 år sedan av läkare.. Säger att undersenaste veckan successivt känt sig allt mer besynnerlig. Åker över till U.S.A. för att börja arbeta hos en man vid namn Cornet i Ill.? En kusin och en väninna skall bo i N.Y. Väninnan skulle komma och möta henne vid ankomst

På kvällen blir hon agiterad och orolig och man blir tvungen att lugna henne med Mo-sc. Hon talar åter igen att hon är syndig och att hon lika gärna kunde få dö. Tror inte att någon människa vill veta av henne..

29.2: Har hela tiden fått skötas och matas. Har vid flera tillfällen vägrat att äta. Varit apatisk legat och dåsat och inte visat intresse för något. Orkar inte något , säger hon. Orkar inte läsa.

I dag på e.m. klarnar pat. upp anmärkningsvärt Säger sig ej ha något minne av en hel del egendomliga saker som hon sagt tidigare. Sovit gott i natt Äter själv. Förnekar hallucinationer. Ser betydlig piggare ut.

Exhibit 3, Report of Boards of Medical Officers

FEDERAL SECURITY AGENCY
U. S. PUBLIC HEALTH SERVICE

March 26, 1948

IN REPLYING, ADDRESS THE
U. S. Marine Hospital
Ellis Island, N. Y.

BSI 70 ~~Col Ave~~
3/25/48

To: District Director, Immigration and Naturalization Service

Subj.: May Gunborg Johnson; Report of a Medical Board, Mar. 25, 1948; Your File: 0300-221545; SI/PX&PU. 4/1

1. Pursuant to the request of the District Director of Immigration and the order of the Medical Officer in Charge, the following Board of Medical Officers of the U. S. Public Health Service, has considered the appeal regarding subject-named alien May Gunborg Johnson and after taking into consideration the certificate of Mar. 11, 1948 and the testimony given by Dr. Carlton Simon, reports that it concurs with the above dated certificate.

Joseph Zinkin
J. ZINKIN
Surgeon (R)

F. D. Regan
F. D. REGAN
S.A. Surgeon, USPHS

P. Lawler
P. LAWLER
Asst. Surgeon (R)

edo
enc.

Respectfully forwarded:
L. E. HOOPER, Medical Director
Medical Officer in Charge

Exhibit 3, Report of Boards of Medical Officers 79

To: District Director, Immigration and Naturalization Service

Subj.: May Gunborg Johnson; Report of a Medical Board
Your File: 0300-221545; SI/PX&PU.

Date: March 25, 1948. Alien represented by Medical Witnesses: Dr. Carlton Simon, 50 E. 58 St., N.Y.C.

The verbatim replies of the Medical Witness; to the following questions are:

Dr. Zinkin: 80

a. Do you regard yourself qualified to testify as a medical expert concerning this alien's mental condition?

I do.

b. On which special training and experience do you base your qualifications to testify as an expert on this case?

I was former psychiatrist to the Narcotic N. Y. S. Commission; consulting psychiatrist in U. S. Induction Center, N. Y. C.

c. What opportunity have you had to make personal examinations of the alien, and what have your examinations comprised? 81

For practically one hour I have been in contact with the patient. Have gone over the past history as far as is available to me and personal history which was given by her. I find that she was born on May 27, 1914. She has three brothers. Only had measles and mumps as a child. Had injections for anemia in 1945. Had some episode in 1945 which she states was due to the fact—and that it was a combination of hard work and at that time was diagnosed as well—lack of vitamins; had lost 10 pounds of weight; had broken her engagement with a man. I know she was

very much in love with another man. The man with whom she was engaged kept calling her up on the phone 4 or 5 times a day; got her frightened and panicky. Liquor has a particularly bad effect upon her she states. Prior to coming on board ship, Stockholm, for her trip to the U. S., she had several days of partying with friends and drank quite heavily. She took bromide the first night on board and in general, was quite exhausted prior to coming on ship. She also took some sleeping capsule, the exact nature of which she does not know. She denies hearing voices or
83. seeing things. Remembers being excited because the doctor insisted on taking her blood pressure. She resisted because she wanted peace and sleep and in order to get rid of the physician's presence, she acquiesced in the affirmative. She however denies seeing faces or hearing voices of physicians at Ellis Island. At present, she is normal. Has no amnesia. Has good memory. No evidence of psychosis. No Romberg. Reflexes normal. Has good insight; is not depressed or unduly elated. Due to bromides and depressive drug intoxication combined as well with previous reaction from drinking. I do not think she is psychotic.

Dr. Zinkin:

84

How long in hospital previously?

She was not in a hospital. She was at home. She was panicky, excited. The man kept phoning her 5 times a day and I guess she was emotionally disturbed. (What about her alcoholism?) She is not suffering from alcoholism. She cannot take much. She is not an alcoholic.

(She denies having had hallucinations?) She says she was so sleepy and so tired that she wanted to have her food sent to her room. The doctor disturbed her and he annoyed her and waited to take her blood pressure. She resisted and in order to get rid of him, kept saying "yes, yes."

Exhibit 3, Report of Boards of Medical Officers 85

Dr. Zinkin:

We have a report from the ship's doctor. (Reads note from ship's doctor). Well, there is no evidence of manic depressive condition there. She seems to be logical and well balanced. By the way she speaks English. I didn't know. I think there is something emotional, but most women are. There is no difficulty in her menstrual periods. She is normal in every way. (Would you say that the episode aboard ship was a psychotic one?) I would not say it is psychotic. I would say that it is a toxemia. The bromides would give delusions. (What is a psychosis 86
then?) I would not call it a psychosis. It is a toxemia. I mean there was nothing permanent. She explains why she answered that way. I think she must have been seasick. (How many bromides did she take?) She says she had 2 tablets.

Dr. Zinkin (Interviewing with the alien—May Gunborg Johnson).

(What happened on the ship?) Yes, but I speak terribly bad English. I come aboard and I go to bed and (Were you drinking,—drunk?) No, but I have been to many many parties before I come on board. Many people say 87
good-bye to me and I have much to do). (What happened on the ship?) I asked what you call up the maid if I could eat in my bed, so I could sleep for 2 or 3 days. (Were you seasick?) Yes, I was. I went out in toilet and gave up something. She said I could not just eat in my bed. She said doctor's orders. (Did doctor come up to see you) Yes. I call the doctor the second day, the day after I come aboard and there come a nurse and she took the temperature you know and she said it is nothing, and the doctor come and say get up. I feel very very tired. (Did you take any medicine before the doctor saw you) Yes, I took two

88 *Exhibit 3, Report of Boards of Medical Officers*

bromides. (How big) Small. Just 2 and one sleeping pill. (You had been taking sleeping pills before, they didn't make you sick) Not a capsule, a little tablet. (Had been taking those before when you needed them in the past and they never made you sick, but put you to sleep) Yes. I have taken it before.

Dr. Lawler:

(Where get these pills) In the apothecary. I had just four and—of them. Some headaches pills and 2 or 3 little
89 sleeping pills. (When you came on board, took one bromide and one sleeping pill) yes.

Dr. Zinkin:

(You remember when the doctor came) There was another girl in the same cabin and she had a vaccination and she was come on board. When we get down, they put me in a little room. (Why put you there) May be they think something was wrong with me. Absolutely not, Complain nothing. I went to sleep and I slept the whole trip over. (You don't know why they put you in that room) I sleep at first and they come in and he ask me some
90 questions and I say yes to everything and he took the pulse and I was hysteric. (Why) I was just tired. But I remember every word. Everything. (When let you out of that room) I was better the last day.

Dr. Regan:

(At the time you was sick did you have any unusual sensations) (Did you happen to see things like bad looking animals) No I never seen any in my life. The doctor ask me, did you hear voices? I said yes. He said, describe it. I said yes, to everything he ask, I didn't see anything. I said, yes, yes, because I was tired and I wanted to be

alone. I have never seen faces in my life. (Have sensation somebody was watching you or talking about you) No. (Did you wonder why you was in that room) No.

Dr. Zinkin:
Dr. Regan:

(All the doctor wanted you to do was go to the dining room) I think I will first take a rest for 2 or 3 days and after that I would go to the dining room. I was not afraid to go to the dining room. They say to me should we lock the door. I said yes, lock the door. (Was the door 92
kept locked) No. If I wanted to I could go out. (Did you have a key to open the door) No, I could just ring, if I wanted to get out. (Would they let you go out yourself) If I wanted to. I liked to stay in bed. (Why) Because I was completely overworked and tired. (How about when you were in the hospital here) Did I stay in bed the whole time? No. You must understand I come just from the ship and was sick and misunderstood and over to this place and I am here since March 1st, and then over to Immigration. I am a month here and it is very hard. I find everybody very nice here. (Where going to) To Chicago—In Illinois. I should work in Mr. K..... home first so I 93
could learn English. I think I would do the same work as I did in Sweden. In film office. I take the orders for the films. (Eat well on the ship) It was very good. I wasn't hungry so I say, no thank you. (Did you think there was something wrong with the food) No. No. It was very good food. There was nothing wrong. I was just very tired.

Dr. Zinkin:

(It will read to you what the ship doctor said) (reads report). (Why) He take my pulse. He said something

I don't like. (What). I said God help me. He said, how did something like you have trust in God. (Why did he say that) I don't know. The first word he said when he come in my cabin he said, "How did she get on board." (Were you drunk when you came on board No. I didn't drink. Just have parties before I get away and my mother was very sorry and I was sorry too and there was so many things. He is not a gentlemen, you know. He put me here and said "I will give her a chance to go into the U. S. and he write a report that I was a little mixed up. (Were you mixed up) I don't know. I sleep and I say yes to everything you know.

Decision of Judge Rifkind of June 10, 1948

The only criticism offered is that the Board of Special Inquiry accepted the certificate of the surgeon of the U. S. Public Health Service and rejected that of the alien's own physician. That is not enough to entitle the alien to relief by habeas corpus. The writ is discharged and the alien remanded.

June 10, 1948.

S. H. Rifkind,
D. J.

Order to Show Cause Why the Proceeding Should Not be Re-argued

97

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

Civ. 45-577

[SAME TITLE]

Upon the annexed affidavit of Gunther Jacobson, sworn to June 18, 1948, and upon the petition and writ herein, and upon the decision of the Honorable Simon H. Rifkind herein, let the respondent herein by John F. McGohey, the United States Attorney, show cause at Room 506 of the United States Court House on June 22, 1948, at 10:30 A. M., or as soon thereafter as counsel can be heard, why the within habeas corpus proceeding should not be re-argued; why the decision of Hon. Simon Rifkind dismissing the writ should not be set aside and modified; and why the writ of habeas corpus herein issued and served should not be sustained; why the relator should not be afforded such other and further relief as may seem just to this court.

98

99

AND IT IS FURTHER ORDERED, that pending the deliberation of the decision on this motion, the deportation of the respondent be stayed.

Sufficient cause appearing, let service of a copy of this order, together with the affidavit on which it is based upon the United States Attorney on or before June 21st, 1948, be sufficient.

Dated: New York, N. Y.,
June 19, 1948.

JOHN W. CLANCY,
U. S. D. J.

ENTER

100

Affidavit of Gunther Jacobson in Support of Motion for Re-argument

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK,)
101 COUNTY OF NEW YORK,) ss.:

GUNTHER JACOBSON, being duly sworn, deposes and says:

I am the attorney for the relator, having succeeded the previous attorney herein, Mr. Haskell R. Barst.

I respectfully apply for reargument of this case upon the following grounds:

1. This is a habeas corpus proceeding, arising from the following facts and circumstances:

The relator herein is a native and citizen of Sweden, a woman of 33 years of age and unmarried. She arrived in
102 the United States on the Swedish Steamship "S.S. Stockholm" on or about March 1st, 1948, with a Quota Immigration Visa to the United States, which was duly issued, as an immigrant for permanent residence. She has been detained since arrival at Ellis Island, and given admission hearings before a Board of Special Inquiry on March 16, 1948, and on April 6, 1948. As a result of these hearings, she was excluded from admission to the United States on the ground that she is mentally defective.

When the relator was on board the S.S. Stockholm during her voyage from Europe to the United States, she became very seasick, which condition was aggravated by the fact that apparently she had celebrated her departure to

the United States with friends before boarding the ship and was somewhat strained by the effect of the farewell parties. In view of her seasickness, she was unable to take her meals in the dining room, and requested service thereof in her stateroom which, according to the strict rules of the steamship line, requires a doctor's certificate. The ship doctor then examined her, and upon arrival at the Port of New York, informed the Immigration Service that he questioned the sanity of the respondent. 103

The relator maintains that this report of the doctor was caused by ill-will as he had behaved in a fashion not becoming to a gentleman. 104

In any event this information from the ship's physician caused the trouble in which the relator now finds herself. Relator's writ of habeas corpus was dismissed about a week ago.

2. The decision of the Board of Special Inquiry herein is tainted by legal error in that the Board assumed it had no power to make its own finding of the mental condition of the relator.

The minutes of the hearing before the Board of Special Inquiry show that on March 16, 1948, the presiding inspector at the end of the hearing, advised the relator as follows: 105

> "You are advised that the certification entered in your case renders you mandatorily excludable so far as this Board is concerned, from which exclusion there is no appeal."

At the same hearing towards the end, the Board made the following conclusion of law:

> "That you are inadmissible to the United States under Section 3 of the Immigration Act of February

106 *Affidavit of Gunther Jacobson*

> 5, 1947, as you have been certified by surgeons of the United States Public Health Service to be mentally defective, Class A."

It is quite obvious that the Board of Special Inquiry proceeded on the theory that it was bound by the Certificate of the Government Physicians, and had no power to make its own findings with respect to relator's mental condition. This attitude of the Board of Special Inquiry is contrary to law.

107 *Section 153 of Title 8, U.S.C.*, last sentence, reads:

> "* * * The decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and except as provided in Section 158 of this title, shall be final as to the rejection of aliens affected * * * with any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under Section 136 of this title."

It is apparent that, while the decision of the Board "shall be based" upon the findings of the medical officers,
108 the Board is not degraded thereby to a rubber stamp. If that had been the intention of Congress, the Board would have been entirely abolished in mental cases. The courts have consequently held that the Board is not bound by the opinion of the Medical Board and that it, in reaching a decision, had to consider *all* evidence brought to its attention. See *Ex parte Joyce*, 212 F. 282. There is a line of decisions supporting this view, which will upon reargument be spread before this Court in a memorandum of law. I confine myself at this moment to citing:

> *Billings* v. *Sitner*, 228 F. 315,
> *Ex parte Liang Buch Chew*, 296 F. 182;

U. S. ex rel Papa v. *Day*, 45 F. (2d) 435;
U. S. ex rel Powlowee v. *Day*, 33 F. (2d) 267 (C. C. A. 2nd).

Again in the interpretation here urged of the statute is directly and clearly expressed in another section of the Immigration Laws, in Section 136(d), Title 8, U. S. C., where it is said that among the aliens excluded from admission into the United States are:

> "Persons * * * who are found to be and are certified by the examining surgeon as being mentally 110
> defective, * * *"

The alien when certified by the surgeon must still be "found to be" mentally defective. This "finding" is the office of the Board of Special Inquiry, which in the present case, contrary to the law, emasculated itself to a rubber stamp of the government physicians.

Under the circumstances, the Court is respectfully urged to proceed pursuant to Section 10 of the Administrative Procedure Act, and to set aside the exclusion order of the Board of Special Inquiry herein because they are arbitrary, capricious and otherwise not in accordance with 111
law, and because they are short of statutory right and because they are without observance of procedure required by law.

It is respectfully called to the attention of the Court that the provisions of the Administrative Procedure Act apply to immigration cases, as has been held by Judge Holtzoff in *Lindenau* v. *Watkins*, 73 Fed. Supp. 216.

3. This motion is further predicated on the ground that the Board of Special Inquiry herein was improperly constituted in that its members do not qualify under Section 5c, 7 and 11 of the Administrative Procedure Act of

1946. That the Administrative Procedure Act applies to the present proceeding has been pointed out before. The exact reasoning on which it is claimed that the Board herein does not qualify with reference to the Administrative Procedure Act will be submitted to the Court in a subsequent memorandum. For the present moment, however, it may suffice to state that Judge Allen Goldsborough recently in a decision not yet reported, enjoined the Department of Justice from continuing deportation hearings against the notorious Communist Eisler on the ground that the immigrant inspector who held the hearings was not a qualified examiner pursuant to Section 11 of the Administrative Procedure Act. This point requires careful preparatory legal work, which will be precipitated into a brief to be submitted at the hearing herein.

4. The Court's attention is further called to the fact that there were two hearings before the Board of Special Inquiry, one on March 16th and one on April 6, 1948. The Board of Special Inquiry was each time composed of different members. It is respectfully submitted that it is contrary to law to have the Board change its composition while the hearings in a case are in progress.

5. It is urged that the procedure administered to this alien, for the reasons stated, is contrary to the Due Process Clause of the Constitution of the United States, 14th Amendment.

6. It is urged that the findings of the Medical Boards herein and of the Boards of Special Inquiry are tainted with legal error, not based upon substantial evidence and arbitrary and capricious, in that all findings against the alien are based solely upon a report of the Swedish physician of the S.S. Stockholm, on which the relator arrived.

This physician was never heard under oath and never produced for cross-examination. He behaved, as I have been informed by the alien, in an "ungentlemanly" way toward her, and his report, it is submitted, is the result of malice. He has, as the record shows, prompted I surmise by remorse, subsequently withdrawn his charges.

Under the circumstances, all findings of both Boards—the Immigration Board and that of the physicians—are based upon inadmissible evidence and make the procedure before both boards objectionable.

That administrative findings under the Administrative Procedure Act must be based upon "substantial evidence" has been held in *Lindenau* v. *Watkins*, 73 F. Supp. 216.

7. The findings of the medical examiners are defective in that they did not show what these eminent physicians call "mentally defective". Most persons who walk this earth are "mentally defective" in that they do not attain that peak of mental alacrity that we admire among the great and outstanding. A decision that just classifies a person as mentally defective without stating the nature of the defect is no decision at all in that it does not show that a deviation from the normal and average has been diagnosed that disables the alien from functioning without disturbing society.

See:

U. S. ex rel Papa v. *Day*, 45 F. (2d) 435.

8. There is nothing in the record to show that the examining government physicians qualify under Section 152, Title 8, U. S. C., in that they had at least two years' experience in the practice of their profession since receiving the degree of doctor of medicine; as a matter of fact, there is no proof that they got any degrees at all and that they all were "medical officers of the United States Public

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Health Service". The certificate should show on its fac that it was issued by duly qualified physicians. In view o the absence of such showing of the qualifications and be cause I have been informed that some of the examinin physicians were quite young, it is urged, on informatio and belief, that the medical examiners were not qualifie to act under Section 152, Title 8, U. S. C.

See:

U. S. ex rel Papa v. *Day*, 45 F. (2d) 435.

119 9. The examination by the medical examiners wa unfair and contrary to law in that this alien, unfamilia with our language, was examined without the help of a interpreter. Section 152, Title 8, U. S. C., expressly pro vides that "the services of interpreters shall be provide for such examination. This section of the statute was no complied with.

10. It is respectfully urged that this young lady i exceptionally mentally alert, of fine character and deport ment, and in her present trouble because of the vindictive ness of the Swedish physician.

120 11. The writ herein having been dismissed by Judg Rifkind about a week ago, the relator is subject to immedi ate deportation and the proceeding by order to show caus is necessary in order to prevent her deportation before th present motion is decided, for which no previous applica tion has been made to any court or judge.

WHEREFORE, it is respectfully prayed that this Cour may grant reargument so that the points urged in this af fidavit may be spread before this Court.

GUNTHER JACOBSON

(Sworn to on June 18th, 1948.)

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Opinion of Judge Rifkind Upon Re-argument

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civ. 45-577

[SAME TITLE]

Appearances:

122

GUNTHER JACOBSON, ESQ., Attorney for Relator.

JOHN F. X. MCGOHEY, ESQ., U. S. Attorney, for Respondent, by WILLIAM J. SEXTON.

RIFKIND, *D. J.*

A writ of habeas corpus, issued on a petition challenging the detention of May Johnson (whom I shall call the Relator) under an order of exclusion, was discharged on June 10, 1948. She has brought on a motion for reargument and has advanced several grounds for her discharge not previously asserted.

123

The following facts are not disputed: Relator is 33 years of age, a native of Sweden. She arrived at the Port of New York on March 1, 1948, in possession of a valid visa for permanent residence in the United States. She was examined by surgeons of the U. S. Public Health Service and certified to be mentally defective. On March 16, 1948, she was accorded a hearing before a Board of Special Inquiry, at the conclusion of which she was advised as follows:

Q. You are advised that the certification entered in your case renders you mandatorily excludable insofar as this board is concerned, from which exclusion there is no ap-

124 *Opinion of Judge Rifkind Upon Reargument*

peal. However, you may appeal from the certificate issued by the Public Health Service to a medical board to be convened by the Public Health Service, at which time you may be represented by a physician of your own selection to give testimony in your behalf. Do you wish to appeal to such a Board? A. Yes, I wish to appeal.

Thereafter she appealed to a Board of Medical Officers of the U. S. Public Health Service which examined the Relator and heard testimony from a physician called by her. It concurred in the original certificate. On April 6, 1948,
125 Relator again had a hearing before a Board of Special Inquiry at which she was represented by counsel and had the assistance of an interpreter. The Board made findings of fact, including, "(6) That there has issued in your case medical certificate certifying you to be 'Mental Defective, Class A' which certificate has been affirmed by a Board of Medical Officers pursuant to your appeal to such a Board." It also reached a conclusion of law, "That you are inadmissible to the United States under Section 3 of the Immigration Act of February 5, 1917 in that you have been certified by surgeons of the U. S. Public Health Service to be mentally defective, Class A.".

126 Relator's first specification is that the Board of Special Inquiry made no independent finding that she was mentally defective; that it regarded itself as bound by the certificate. I agree that the Board acted in reliance upon the certificate but I hold that in so doing it acted within the law. Section 136 of Title 8 U. S. C. provides as follows:

> "The following classes of aliens shall be excluded from admission into the United States: * * * (d) Persons not comprehended within any of the classes enumerated in paragraphs (a), (b) or (c), who are found to be and are certified by the examining sur-

geon as being mentally or physically defective, such physical defect being of a nature which may affect the ability of such alien to earn a living—."

Section 153 of the same title provides:

"The decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and, except as provided in Section 158 of this title, shall be final as to the rejection of aliens affected with tuberculosis in any form or with a loathsome or dangerous contagious disease, or with 128
any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under Section 136 of this title."

Relator relies upon *Ex parte Joyce*, D. Mass., 1913, 212 Fed. 282; *Billings* v. *Sitner*, C. C. A. 1, 1915, 228 Fed. 315. Both of these cases were decided under the 1907 statute, whereas the instant case is under the 1917 Act. The 1907 statute, Act of February 26, 1907, c. 1134, Sec. 10; 34 Stat. 901, did not provide that the decision of the board of special inquiry "shall be based upon the certificate." It pro- 129
vided merely "that the decision of the board of special inquiry, hereinafter provided for, based upon the certificate of the examining medical officer, shall be final" in stated instances.

Relator also relies on *Ex parte Liang Buck Chew*, D. Mass. 1923, 296 Fed. 182. That case came up under the 1917 Act. Even that is distinguishable in that the alien was there excluded under Section 136(c), whereas here the Relator has been found to belong under 136(d). There is a striking difference in the language of the two subsections. The exclusion of 136(d) is not directed against

"mental defectives" but against persons "who are found to be and are certified by the examining surgeon as being mentally * * * defective." I do not emphasize this distinction. Judge Patterson, in *U. S. v. Reimer*, S. D. N. Y. 1938, 25 Fed. Supp. 552, in the case of an alien excluded under Section 136(c) held that the determination of the examining medical officer was decisive. He noted that "apparently the rule in the First Circuit is the other way."

I conclude that the first specification is without merit.

Relator's second specification is that the Board of Special Inquiry was not constituted in compliance with the
131 Administrative Procedure Act, 5 U. S. C. A. Section 1010. Assuming that to be so, such boards have a dispensation accorded to them by Section 1006 of the Act, which, so far as is pertinent, reads as follows:

> "(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this chapter; but nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or in part by or before boards or
> 132 other officers specially provided for by or designated pursuant to statute."

Boards of special inquiry operating under the Immigration Act are "specially provided for by or designated pursuant to statute" 8 U. S. C. A. 153.

Finally, Relator objects that the certificate of the examining surgeons does not disclose that they have had "especial training in the diagnosis of insanity and mental defects" as prescribed by 8 U. S. C. A., Section 152.(1) It is to be noted that the Relator does not assert that they lack that qualification. The presumption of regularity in

the conduct of official business, it seems to me, is sufficient to preserve the validity of the certificate, at least, in the absence of an affirmative showing of non-compliance with the statute.

The motion for reargument is granted, and upon such reargument the original decision is adhered to.

Dated: July 6, 1948.

SIMON H. RIFKIND,
U. S. D. J.

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(1) Cf. U. S. v. Day, C. C. A. 2, 1929, 33 Fed. 2d 267 and U. S. v. Day, S. D. N. Y. 1930, 45 Fed. 2d 435.

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136

Order Appealed From

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civil 45-577

[SAME TITLE]

The writ of habeas corpus in the above-entitled matter
137 having come on to be heard before this Court on the 28th day of May, 1948, and after hearing Haskell R. Barst, Esq., attorney for the relator, in support of the writ, and John F. X. McGohey, United States Attorney for the Southern District of New York (William J. Sexton, Assistant United States Attorney, of counsel), in opposition thereto, and upon the petition for the writ of habeas corpus, the return thereto, and all the papers and proceedings had herein it is

ORDERED, that the writ of habeas corpus be dismissed, and it is

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FURTHER ORDERED, that the relator be remanded to the custody of the Commissioner, Immigration and Naturalization Service, at Ellis Island, New York Harbor, N. Y.

Dated: New York, N. Y., July 6, 1948.

SIMON H. RIFKIND,
U. S. D. J.

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Notice of Appeal

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civ. 45-577

THE UNITED STATES OF AMERICA, upon the relation of INGA OBUM,

against

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W. F. WATKINS, District Director of the IMMIGRATION AND NATURALIZATION SERVICE in the New York District, or such other person, if any, who may have the custody of MAY JOHNSON, relator.

Sir:

PLEASE TAKE NOTICE that the May Johnson, the person in custody and the relator herein, hereby appeals to the Circuit Court of Appeals for the Second Circuit from the final order dated July 6th, 1948, dismissing the writ of habeas corpus herein and remanding the relator to the custody of the Commissioner of Immigration and Naturalization, and this appeal is from the whole of said order and from each and every part of said order.

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Dated, New York, July 23rd, 1948.

Yours, etc.,

GUNTHER JACOBSON,
Attorney for the Relator,
Office and P. O. Address,
36 West 44th Street,
New York City.

To:

1. JOHN F. X. MCGOHEY, ESQ.,
U. S. Attorney for Respondent.

2. CLERK U. S. DISTRICT COURT,
Southern District, N. Y.

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Stipulation as to Record

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, EX REL., MAY JOHNSON,
Relator-Appellant,

against

W. FRANK WATKINS, District Director of the Immigration and Naturalization Service in the New York District, or such other person, if any, who may have the custody of MAY JOHNSON,
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Respondent-Appellee.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter and agreed upon by the parties and that both parties may hand up to the Court, upon the argument of the appeal, the originals of any and all exhibits used in the proceeding in the District Court.

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Dated, New York, September 1st, 1948.

GUNTHER JACOBSON,
Attorney for Relator-Appellant.

JOHN F. X. MCGOHEY,
United States Attorney for the
Southern District of New York,
Attorney for Respondent-Appellee.

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Clerk's Certificate

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, EX REL., MAY JOHNSON,
Relator-Appellant

against

W. FRANK WATKINS, District Director of the Immigration
149 and Naturalization Service in the New York District, or
such other person, if any, who may have the custody of
MAY JOHNSON,

Respondent-Appellee

UNITED STATES OF AMERICA,
SOUTERN DISTRICT OF NEW YORK, } ss.:

I, WILLIAM V. CONNELL, Clerk of the District Court of
United States of America for the Southern District of New
York do hereby certify that the foregoing is a correct tran-
150 cript of the record of the said District Court in the above
entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the
said Court to be hereunto affixed, this -day of Sep-
tember, 1948, in the year of our Lord One Thousand Nine
Hundred and Forty-eight and of the Independence of the
said United States the one hundred and seventy-second.

WILLIAM V. CONNELL,
Clerk

[fol. 51] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1948.

No. 67

Argued November 4, 1948 Decided November 29, 1948.

Docket No. 21095

UNITED STATES OF AMERICA, ex rel. MAY JOHNSON, Relator-Appellant,

against

W. FRANK WATKINS, District Director of the Immigration and Naturalization Service in the New York District, or such other person, if any, who may have the custody of May Johnson, Respondent-Appellee.

Before: L. Hand, Augustus N. Hand and Clark, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

From an order dismissing a writ of habeas corpus and remanding the relator May Johnson to the custody of the Commissioner of Immigration and Naturalization, the relator appeals. Affirmed.

[fol. 52] Gunther Jacobson, Attorney and counsel for relator May Johnson.

John F. X. McGohey, United States Attorney, for respondent; William J. Sexton, Assistant United States Attorney, and Alvin Lieberman, Attorney, Immigration and Naturalization Service, United States Department of Justice, Counsel.

AUGUSTUS N. HAND, Circuit Judge:

The relator, a native and citizen of Sweden, arrived at the Port of New York on March 1, 1948, and applied for admission into the United States as a quota immigrant. Upon arrival she was examined by medical officers [hereinafter referred to as examining surgeons] of the United States Public Health Service who found her to be mentally defective, and made a certificate to that effect.

On March 16, 1948, she was accorded a hearing before a Board of Special Inquiry upon her application for admission at which hearing the above mentioned certificate was received in evidence. This hearing was suspended to permit the relator to appeal from the certificate issued by the examining surgeons to a board of medical officers of the United States Public Health Service convened by the Surgeon General.

On March 26, 1948, the medical board, after considering all the evidence including the certificate and the testimony given by one Dr. Carlton Simon, a psychiatrist chosen by the relator pursuant to Section 16 of the Immigration Act of 1917 (8 U. S. C. 152) to appear as her expert medical witness before the board, reported that it concurred with the examining surgeons' certificate.

[fol. 53] The hearing before the Board of Special Inquiry was resumed on April 6, 1948, at the conclusion of which that board, after introducing into the record the report of the medical board, made the following findings of fact and conclusion of law (the word "you" as used in the findings and conclusion referring to relator):

"Findings of Fact:

1. that you are an alien, a native and citizen of Sweden;

2. that you last arrived in the United States at the port of New York on March 1, 1948 on the SS Stockholm;

3. that you are an applicant for admission to the United States for permanent residence;

4. that you are in possession of valid Swedish passport;

5. that you are in possession of an unexpired quota immigration visa;

6. that there has issued in your case medical certificate certifying you to be 'Mental Defective, Class A' which certificate has been affirmed by a board of medical officers pursuant to your appeal to such a board.

Conclusions of Law: That you are inadmissible to the United States under Section 3 of the Immigration Act of February 5, 1917 in that you have been

certified by surgeons of the U. S. Public Health Service to be mentally defective, Class A."

[fol. 54] It is argued on behalf of the relator that the Board of Special Inquiry made no independent decision as to whether she was mentally defective but merely followed the conclusions of the certificate of the medical board of the Public Health Service to which the relator had taken an appeal pursuant to Section 16 of the Immigration Act of 1917, 8 U. S. C. A. §152. We think that the conclusion of the medical board was binding on the Board of Special Inquiry within the meaning of Section 17 of the Act of 1917 (8 U. S. C. A. §153). That section provided that:

> "The decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and * * * shall be final as to the rejection of aliens affected * * * with any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under section 3 of this act."

The relator insists that the Board of Special Inquiry was not bound by the opinion of the medical board and in reaching its decision should not have rejected evidence offered to show that she was sane. Reliance is placed on decisions of Judge Morton in the District Court of Massachusetts to support the contention that the medical certificate was not final in respect to the relator's mental state and to the decision of the Court of Appeals of the First Circuit to the same effect. *Billings* v. *Sitner*, 228 Fed. 315; *Ex parte Joyce*, 212 Fed. 282, 285 (D. C. Mass.). These decisions were made under the Immigration Act of 1907. Section 10 of that act provided that the decision of the Board of Special Inquiry "based upon the certificate of the examining medical officer, shall be final." Judge Dodge writing for the Court of Appeals in *Billings* v. *Sitner*, 228 Fed. 315, 316, said:

> [fol. 55] "* * * Although immigration rule 17, subdivisions 4, 5 (note), state that the board is 'virtually compelled' to base its decision upon the certificate, we hold that if has no right to do so without exercising its own judgment, after considering not only the certificate, but whatever other evidence there may be touching the

alien's right to enter. The District Court had previously so held in another case. Re Joyce, 212 Fed. 282, 285."

It is to be noted that Section 17 of the Immigration Act of 1917 substituted for the words of Section 10 of the Act of 1907, which appear in the margin,[1] the following:

> "That the decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and * * * shall be final as to the rejection of aliens affected * * * with any mental or physi- [fol. 56] cal disability which would bring such aliens within any of the classes excluded from admission to the United States under section three of this Act."[2]

---

[1] "That the decision of the board of special inquiry based upon the certificate of the examining medical officer shall be final as to the rejection of aliens affected * * * with any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under section two of this Act."

The pertinent provisions of Section 2 of the Act of 1907 are as follows:

"That the following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane within five years previous; persons who have had two or more attacks of insanity at any time previously; paupers; persons likely to become a public charge; professional beggars; persons afflicted with tuberculosis or with a loathsome or dangerous contagious disease; persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living; * * *"

[2] Section 3 of the Act of 1917 contains language substantially identical to that of Section 2 of the Act of 1907.

The Report of the Senate Committee made at the time of the enactment of Section 17 of the Act of 1917, as published in Sen. Rep. 352, 64th Cong., was as follows:

> "* * * Section 10 of the Act of 1907 making the certificate of the examining medical officer and the decision of a board of special inquiry based thereon conclusive and final in certain cases of disease and mental defect has been added to this section as a proviso * * * but the said provision has been slightly changed so as to clarify its meaning and meet recent court decisions tending to modify the principle, upon which provisions of this kind in the immigration law have heretofore been based, that on medical questions the opinions of doctors as against that of laymen should prevail. Of course practical questions should be determined by the immigration officials, but questions of purely medical nature must be determined by members of the medical profession."

It seems clear that the "recent court decisions" referred to in the above Senate Report were those of the federal courts of the First Circuit. No others existed which have been called to our attention. The report plainly indicates the Senate Committee's view that these decisions did not properly construe Section 10 of the Act of 1907. In such a setting, the words of Section 17 "that the decision of a [fol. 57] Board of Special Inquiry shall be based upon the certificate of the examining medical officer" inevitably indicate that the Board must adopt the findings of the certificate on such medical questions as are here involved. What else can be meant by the words: "on medical questions the opinions of doctors as against that of laymen should prevail." A certificate by the medical board if its action conformed to the statute and regulations and its decision was made after a fair hearing was plainly intended to be conclusive.

In *Ex parte Liang Buck Chew*, 296 Fed. 182 (D. Mass. 1923), Judge Morton dealt with the finality of a medical certificate under the provisions of the Act of 1917. He in effect adhered to the decisions in the First Circuit interpreting the Act of 1907, but made no mention of the Senate Report which probably had not been called to his attention and rested his decision that the medical certificate was not final largely upon language in Section 16 of the 1917

Act that the certificate was "for the information * * * of the boards of special inquiry." Undoubtedly it was for the information of the latter, who under no circumstances could act without having it before them. That the Board of Special Inquiry was not bound to base its decision, so far as it involved medical facts, upon the certificate does not follow from the terms of the Act of 1917 and seems directly contrary to the Senate Report and its expressed purpose. In this connection, we must remember that the language of the Act of 1917 so heavily relied on by Judge Morton is also to be found in Section 17 of the Act of 1907, so that his reasoning fails to answer the clear implications of the Senate Report.

The views we have expressed as to the effect of a certificate by the medical board are in accord with the decision of this court in *United States ex rel. Fink* v. *Tod*, 1 F. 2d, 246. The primary question in that case was whether the [fol. 58] Secretary of Labor could reopen hearings which had been held by the medical board. We decided that he could not, saying in that connection:

> "* * * The statute declares that the board of special inquiry shall base their decision upon the medical certificate. We can only interpret this to mean that the medical certificate is conclusive as to the physical and mental condition of the alien examined. And we do not think it was intended that the board of special inquiry constituted of nonmedical men should have the right to sit in review upon decisions of medical questions rendered by a board of medical officers or by a medical inspector. If such was not the intention, why require that the decision of the board of special inquiry 'shall be based upon the certificate of the examining medical officer'?"

This court finally said in denying an application for reargument that a Board of Special Inquiry could, on such grounds as fraud or newly discovered evidence, order the medical board to reopen hearings, but that the Secretary of Labor could not. We plainly held that in the absence of such a reopening at the behest of the board, the medical certificate was to be regarded as conclusive. The contention that our former decision no longer represents the law because it was reversed by the Supreme Court on confession

of error, 267 U. S. 571, is without merit. We have no reason to regard a reversal on confession of error as indicating any decision on the merits by the appellate court. We cannot know what considerations moved the government to confess error in a case which had been pending for two and a half years and in which the medical experts had widely differed.

[fol. 59] The Court of Appeals of the Ninth Circuit in *Gee Shew Hong* v. *Nagle*, 18 F. 2d 248, is said to have reached a decision contrary to that in the *Tod* case respecting the conclusiveness of a medical certificate. While certain language in the opinion warrants this contention, we think the decision necessarily involved only the right of the Board of Special Inquiry to reopen the proceedings before the medical board. In the case at bar, no reopening was attempted so that we do not have before us the critical question facing the Ninth Circuit regarding the right of the Board of Special Inquiry to reopen, as to which the opinion cannot be said to have differed with our decision in *United States ex rel. Fink* v. *Tod*, *supra*.

In *United States ex rel. Frumcair* v. *Reimer*, 25 F. Supp. 552 (S. D. N. Y.), Judge Patterson decided that the language of Sections 16 and 17 of the Immigration Act of 1917 rendered the medical certificate conclusive and precluded the Board of Special Inquiry from hearing additional testimony calculated to overthrow the certificate. We are in accord with the reasoning and decision of Judge Patterson.

The contention that the Board of Special Inquiry was not properly constituted under Section 11 of the Administrative Procedure Act (5 U. S. C. A. §1010) is fully met by Section 7 of that Act and was properly disposed of by Judge Rifkind in the court below.

The contention that the medical board did not allow a fair hearing because it gave undue weight to a medical report by a Swedish doctor who treated and observed the alien during her voyage to the United States is without substance. Such evidence, though hearsay, was properly incorporated in the record and considered by the medical board. The alien was given an opportunity to correct it by the examination conducted by the medical board and by [fol. 60] the testimony of her own expert medical witness before the appeal board in accordance with the provisions of

Section 16 of the statute. Moreover, the report of the Swedish doctor had confirmation in the alien's own admission that she had told him that she had hallucinations. She only explained this admission by saying "I say yes to everything and he took the pulse and I was hysteric." It was for the medical board to determine the weight to be given her explanation in the light of all the surrounding facts.

For the foregoing reasons, the order dismissing the writ of habeas corpus is affirmed.

CLARK, Circuit Judge (dissenting):

I agree with the propositions of law stated in the opinion, but am troubled by another matter not there discussed, namely, the stark and unadorned form of medical certificate, *i.e.*, that relator "has this day been examined and is found to be afflicted with—

MENTAL DEFECTIVE

Class 'A,'"

followed by the signatures of two surgeons. The Immigration Act of 1917, 8 U. S. C. A. §136(d), provides for the exclusion of person "who are found to be and are certified by the examining surgeon as being mentally or physically defective," thus in respondent's own words providing that "the examining surgeons were to do both the finding and the certifying." Nothing in the record tells us what a Class "A" Mental Defective is or how much the classification adds to the damning phrase. But search and the help of counsel show that the phrase goes back to the Regulations of the Surgeon General for the Medical Examination [fol. 61] of Aliens, the applicable provisions being those of September 15, 1947, as approved by the Federal Security Administrator pursuant to 8 U. S. C. A. §152, 42 id. §§249(c), 252, and set forth in 42 C. F. R., 1947 Supp., 34.1-34.13. These seem, at first blush at least, clear and admirable; they seem just as clearly not complied with here. Sec. 34.7 shows that there are three classes, with four types of diseases and defects in Class 'A,' including tuberculosis, a loathsome or dangerous contagious disease, a series of de-

fects, including idiocy, imbecility, chronic alcoholism, and four other types of like diseases, and finally a catchall group of mental defects not enumerated in the previous paragraph and not showing mental shortcomings due to ignorance, etc. This is a variegated list, among which the relator is left to guess as to her particular affliction. If we consider the certificate to refer to the last two paragraphs only, that still leaves some eight types of affliction.

But this vagueness seems directly contrary to the requirements of the regulations, which in §34.2(c) defines a certificate as a document issued by an examining medical officer to the Immigration Service, "signed by him and certifying his findings with respect to an alien's physical and mental condition." That real, and not formal, findings are meant is shown by the detailed provisions for re-examination by a specially convened board upon the alien's appeal, §34.13, leading to *findings and* conclusions on its part, viz.,

> "(g) The findings and conclusions of the board shall be based on its medical examination of the alien and on the evidence presented to it and made a part of the record of its proceedings.
>
> "(h) The board shall report its findings and conclusions to the Immigration Service, and shall also [fol. 62] give prompt notice thereof to the alien if the re-examination has been held upon his appeal. The board's report to the Immigration Service shall specifically affirm, modify, or reject the findings and conclusions of prior examining medical officers."

Not only was the original certificate therefore defectively general, but there was no compliance with the provisions last quoted, and particularly the last sentence of (h). The statement of the Board of Medical Officers was merely that it had considered the appeal and, "after taking into consideration the certificate of Mar. 11, 1948 and the testimony given by Dr. Carlton Simon, reports that it concurs with the above dated certificate."

While I agree that the ideas of laymen should not control the views of medical experts upon this medical question, yet it does seem that under the statute the Board of Special Inquiry does have some function in the premises, namely, to see that there is an adequate and revealing certificate, just as the Surgeon General has required. Thus it

certainly should reject one which is self-contradictory, and the court must sustain the writ of habeas corpus if it does not, as was held in *Hughes* v. *U. S. ex rel. Licata*, 3 Cir., 295 F. 800, 802, affirming D. C. E. D. Pa., 289 F. 808. As Judge Learned Hand has said: "It is indeed another matter whether the certificate should not itself state the evidence upon which the conclusion is based, and what efforts have been made to ascertain the facts between entry and arrest. Certainly that is desirable." *U. S. ex rel. Povlowec* v. *Day*, 2 Cir., 33 F. 2d 267, 268, certiorari denied 280 U. S. 594. See also *U. S. ex rel. Papa* v. *Day*, D. C. S. D. N. Y., 45 F. 2d 435; and compare *U. S. ex rel. Devenuto* v. *Curran*, 2 Cir., 299 F. 206, 213. *U. S. ex rel. Fong On* v. *Day*, 2 Cir., 54 F. 2d 990, 991, 992, which finds no error in the admission in [fol. 63] evidence before a board of a certificate as to age based upon observation, where the relator had not availed himself of his privilege of calling the surgeon to testify, concerns so different a situation as to point the moral here. There was no question of according it conclusive effect. Even as evidence Judge Swan criticized it, saying, "Such a certificate is competent evidence, although it would carry more weight if it contained a statement of the nature of the surgeon's examination of the applicant and the grounds upon which he based his conclusion."

These general reactions of eminent judges are now given specific point by the Surgeon General's detailed regulations. Had the prescribed practice been followed here, we would not have been faced with this quite anomalous record where actual decision lurks behind the vaguest of medico-legal generalities and the precise and detailed evidence of the relator's expert does point to a result unjustifiably harsh. I would reverse the order and direct that the writ be sustained because of inadequacy of the original certificate of the examining surgeons and total failure of the reviewing Board of Medical Officers to comply with the regulations.

[fol. 64] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of November, one thousand nine hundred and forty-eight.

Present: Hon. Learned Hand, Chief Judge, Hon. Augustus N. Hand, Hon. Charles E. Clark, Circuit Judges.

UNITED STATES ex rel. MAY JOHNSON, Relator-Appellant,

v.

W. FRANK WATKINS, District Director, etc., Respondent-Appellee

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 65] [Endorsed:] United States Court of Appeals, Second Circuit. United States ex rel. May Johnson v. W. Frank Watkins, etc. (67.) Judgment. United States Court of Appeals, Second Circuit. Filed November 29, 1948. Alexander M. Bell, Clerk.

[fol. 66] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 67] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 7, 1949.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT, U.S.

Supreme Court of the United States

OCTOBER TERM, 1948

No. 506

UNITED STATES OF AMERICA, *ex rel.* MAY JOHNSON,

Petitioner,

against

W. FRANK WATKINS, District Director of the Immigration and Naturalization Service in the New York District, or such other person, if any, who may have the custody of MAY JOHNSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

GUNTHER JACOBSON,
Counsel for Petitioner.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y. 7 BARCLAY 7-0349

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BRIEF IN SUPPORT OF PETITION FOR WRIT:

POINT I—It was error on the part of the board of special inquiry and the courts below to deem the board of special inquiry bound by the certificate of the U. S. Public Health Service and to reject the evidence offered by the petitioner to show her sanity.

Certiorari should be granted because of conflicting circuit court decisions on the above point; because the question of federal law involved is important and ought to be settled; because the federal question involved was decided below in a way probably in conflict with an applicable decision of this court; because the courts below departed from the usual course of judicial proceedings, which departure calls for the exercise of this court's power of supervision 8

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POINT II—It was error on the part of the board of special inquiry and of the courts below to use as basis for petitioner's exclusion a medical report so vague, indefinite, and perfunctory, that it did not show the nature of petitioner's purported affliction nor the qualifications of the examining physicians, that it was based exclusively upon the insufficient evidence of the hearsay report of the Swedish ship's doctor.

Certiorari should be granted because of conflicting circuit court decisions on the above point and because the question of federal law involved is important and ought to be settled 24

POINT III—It was legal error of the court below not to reverse the decision of the District Court in that the procedure before the board of special inquiry and the composition of the board were contrary to the Administrative Procedure Act and in that said board's decisions therefore were without due process of law, void and of no effect.

Certiorari is sought so that this court may determine and settle the problems arising from the impact of the Administrative Procedure Act upon the admission procedure of the Immigration and Naturalization Service. This important question of federal law ought to be settled 28

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Supreme Court of the United States

OCTOBER TERM, 1948

No.

UNITED STATES OF AMERICA, *ex rel.* MAY JOHNSON,

Petitioner,

against

W. FRANK WATKINS, District Director of the Immigration and Naturalization Service in the New York District, or such other person, if any, who may have the custody of MAY JOHNSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI

(Reference to folios)

Proceedings and Opinions Below

Petitioner prays for a writ of certiorari to review the decree hereinafter described of the United States Court of Appeals for the Second Circuit, which decree was made and entered on 29 November 1948.

Petitioner, a Swedish woman, upon arrival at New York City, was excluded from the United States by a board of special inquiry of the Immigration and Naturalization Service, which adjudicated her as mentally defective. There being no appeal from such exclusion order, petitioner sued out a writ of habeas corpus, which, after argument and re-

argument, was dismissed by Judge Simon H. Rifkind of the United States District Court for the Southern District of New York. The Judge wrote an opinion dated the 6 July 1948 (121-124).

The Court of Appeals, upon petitioner's appeal, affirmed Judge Rifkind's order by a two to one decision, dated the 29 November 1948, Honorable W. E. Clark, C. J., dissenting. None of the opinions in the courts below has as yet been reported.

This case reached the Supreme Court of the United States once before. Judge Augustus N. Hand of the Court of Appeals, Second Circuit, the same Judge that wrote the majority opinion below, denied on the 27 July 1948 petitioner's application for a stay of deportation pending the appeal herein. Thereafter Mr. Justice Stanley Reed of this court granted petitioner a stay of deportation pending the proceeding. Mr. Justice Reed's order of the 18 August 1948 is on file in the office of the Clerk of this court.

The petitioner, upon an order of Judge Rifkind, has been at large under a court bond and caused no trouble or inconvenience to anybody. She is now gainfully employed in New York City.

Jurisdiction

The order of the Court of Appeals was rendered and entered on the 29 November 1948. The jurisdiction of this court is invoked under Section 1254(1) of Title 28 U. S. C. and section 5(b) of Rule 38 of the Revised Rules of this Court, as amended.

Statement of Matter Involved

The petitioner, a woman of thirty-three years of age, a native and citizen of Sweden arrived on board the steamship Stockholm at the Port of New York on the first of March 1948 and applied for admission to the United States as a quota immigrant (23).

When seasick and exhausted, on board the Stockholm, petitioner had received the medical attention of the physician (ship's doctor) on board the Swedish ship (12). Some difficulties had ensued between the petitioner and the ship's doctor, who according to petitioner's report "disturbed her and annoyed her" (84) and "behaved in a fashion not becoming a gentleman" (94). When the ship arrived in New York, the ship's doctor turned over to the United States Public Health Service a report in the Swedish language in which petitioner's sanity was questioned (67). She was therefore examined by surgeons of the Public Health Service at Ellis Island, who issued on the 11 March 1948 a medical certificate reading (64, 65):

> "This is to certify that the above described person has this day been examined and is found afflicted with Mental Defective Class 'A'
>
> B. Pasquarelli, S. A. Surgeon
> C. W. Mangun, Surgeon."

The certificate does not show the nature of petitioner's purported affliction nor the qualification of the surgeons for the "diagnosis of insanity and mental defects," as prescribed in 8 U. S. C. 152 (p. 40 below), see record 67.

Petitioner is informed and believes that there are no two persons qualified to diagnose mental defects or diseases on Ellis Island and has alleged this in the petition for re-argument (118).

Upon relator's appeal to the board of medical officers of the Public Health Service, a short hearing was held and said board, taking into consideration the medical certificate and testimony given against it by Dr. Carlton Simon, an expert called by petitioner, affirmed the finding of the surgeons (77).

A board of special inquiry, composed of two immigrant inspectors and a stenographer, held a hearing on the 16 March 1948 and again another one on the 6 April 1948. One Inspector Mintzer participated as board member in the second hearing in lieu of one Inspector Danielson, who had sat in the first hearing (29, 44).

Petitioner in her second hearing was advised by the board of special inquiry as follows (58-59):

> "Findings of Facts:
>
> (6) that there has issued in your case medical certificate certifying you to be a 'Mental Defective, Class A' which certificate has been affirmed by a board of medical officers pursuant to your appeal to such a board.
>
> "Conclusions of Law:
>
> That you are inadmissible to the United States under Section 3 of the Immigration Act of February 5, 1917 in that you have been certified by surgeons of the U. S. Public Health Service to be mentally defective Class A."

An offer by petitioner's previous attorney (55) of further medical testimony of private psychiatrists and other medical evidence in opposition to the findings of the government surgeons was denied by the above ruling of the board. The board of special inquiry thereupon excluded the applicant from the United States (60).

Questions Presented

Thereafter, the habeas corpus proceedings described hereinabove were instituted. The questions presented were:

(a) Whether the board of special inquiry committed legal error in deeming itself bound by the certificate of the U. S. Public Health Service and in rejecting the evidence offered by the petitioner to show her sanity (104).

(b) Whether the medical report on which the board of special inquiry excluded the petitioner is defective, in that it fails to state the nature of the alien's affliction and the specific findings of the government surgeons, and in that it fails to state that the government surgeons were qualified to act under 8 U. S. C. 152, and in that the findings of the surgeons and the board of medical officers were based on insufficient evidence, to wit, the hearsay report of the Swedish ship's doctor (114, 115), which the latter had revoked (13).

(c) Whether the boards of special inquiry acting herein had jurisdiction in view of the fact that they were neither composed nor acting in accordance with the rules of the Administrative Procedure Act (111, 113).

Judge Rifkind in his opinion of 6 July 1948 (122 to 133) dismissed the writ, without receiving evidence, on the grounds: That the board of special inquiry acted within the law in ruling in reliance upon the certificate of the government surgeons and without making an independent finding that petitioner was mentally defective (126); that the Administrative Procedure Act does not affect the composition of Board of Special Inquiry; that there are no defects visible on the face of the medical certificate.

The opinion of the majority of the judges in the Court of Appeals affirmed Judge Rifkind's order, Judge Clark dissenting, as aforesaid, on the ground that the medical certificate was insufficient.

Reasons Why Certiorari Should be Granted

These reasons are set forth in the brief in the caption of each point and at the end of each point. To avoid repetition, reference is respectfully made to the brief annexed hereto.

Wherefore, it is respectfully prayed that a writ of certiorari issue to the U. S. Court of Appeals for the Second Circuit.

New York City, 6 January 1949.

Respectfully submitted,

GUNTHER JACOBSON,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1948

No.

UNITED STATES OF AMERICA, *ex rel.* MAY JOHNSON,

Petitioner,

against

W. FRANK WATKINS, District Director of the Immigration and Naturalization Service in the New York District, or such other person, if any, who may have the custody of MAY JOHNSON,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The petitioner has submitted a petition for a writ containing the prescribed statements of facts concerning the proceedings below and the merits of the case, and the conclusions of law why the writ should be granted.

This brief sets forth the legal argument, point by point, quoting and citing authority where necessary, and mentioning additional facts appearing on the record where advantageous for continuous reasoning.

A complete compendium of all statutes and regulations cited is appended to the brief. The assignment of errors appears from the captions of the following points:

POINT I

It was error on the part of the board of special inquiry and the courts below to deem the board of special inquiry bound by the certificate of the U. S. Public Health Service and to reject the evidence offered by the petitioner to show her sanity.

Certiorari should be granted because of conflicting circuit court decisions on the above point; because the question of federal law involved is important and ought to be settled; because the federal question involved was decided below in a way probably in conflict with an applicable decision of this court; because the courts below departed from the usual course of judicial proceedings, which departure calls for the exercise of this court's power of supervision.

The board of special inquiry herein proceeded on the theory that it was legally unable to make its own findings of the mental condition of the relator. It refused to hear testimony of relator's physicians that she was mentally healthy and sane (54-59).

The minutes of the hearing before the board of special inquiry show that on 16 March 1948 the presiding inspector, at the end of the hearing, advised the relator as follows:

> "You are advised that the certification entered in your case renders you mandatorily excludable so far as this board is concerned, from which exclusion there is no appeal."

At the following hearing towards the end, the board made the following conclusion of law:

> "That you are inadmissible to the United States under Section 3 of the Immigration Act of February 5, 1947, as you have been certified by surgeons of the United States Public Health Service to be mentally defective, Class A."

Judge Rifkind in his opinion (126) stated with respect to this phase of the case:

> "I agree that the Board acted in reliance upon the certificate but I hold that in so doing it acted within the law."

The same conclusion was reached by the Court of Appeals, Second Circuit. It is submitted that the judges below and the members of the board of special inquiry are in error.

Sentence 4 of Section 153, Title 8, U. S. C. A., setting forth the powers of the boards of special inquiry, reads:

> "Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported."

The statute clearly vests the power to determine the admissibility of an alien in the boards and in no other agency. In the present case the board refused to determine but found as a matter of law that it was bound by the medical certificate!

The powers of the medical examiners are set forth in section 152, Title 8, U. S. C. A., which holds in sentence 1:

> "The physical and mental examination of all arriving aliens shall be made by medical officers of

> the United States Public Health Service who shall conduct all medical examinations and shall certify, for the information of the immigration officers and the boards of special inquiry hereinafter provided for, any and all physical and mental defects or diseases observed by said medical officers in any such alien; * * *."

It is here clearly shown that the certification of the medical officers is "for the information of * * * the boards of special inquiry", and it is respectfully submitted that, were it otherwise, the statute would be void and in violation of the due process clause of the Fifth Amendment of the Constitution of the United States. The boards of special inquiry are the fact finding tribunals, the medical officers are experts whose opinion can be challenged and overcome by contrary evidence.

The opinion here expounded has been the prevailing opinion in the United States Circuit Courts and, it may be inferred, is the opinion of the Supreme Court of the United States.

The leading cases in the First Circuit are:

Ex parte Joyce, 1913, D. C. Mass., 212 F. 282.

This was a petition for a writ of habeas corpus on behalf of Nora Joyce, an alien immigrant excluded from the United States on the ground of feeble-mindedness. It was held in said case by Morton, D. J.:

> "The tribunal by which the right of an alien to enter is to be determined is the board of special inquiry. As I understand the act, the medical board

is not an appellate tribunal to correct the errors of the medical inspector; its members are merely called upon to furnish information to the board of special inquiry which is to decide the case, their opinion, as contained in their required certificate, or as given orally at the hearing, is evidence to be considered by the board of special inquiry. The board of special inquiry is not bound by the opinion of the medical board, and ought, in reaching a decision, to consider all evidence which is brought to its attention.

"(287) * * * it seems to me that the board of special inquiry made an error of law in assuming that it was bound to act in accordance with the medical certificate. There can be no doubt that the error of law was fundamental. It led the immigration authorities to refuse the alien's request for an opportunity to obtain evidence in her behalf, and to refrain from making any independent decision of the case * * *

"After the writ has been issued and served and Joyce is in the custody of this court for a re-hearing of the case, in accordance with the decision in Chin Yow v. U. S., 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369, she may be admitted to bail in the sum of $500, and the case itself may go on the list for September 8th for a hearing on the merits. At that time I will hear and determine the question whether she is entitled to admission."

Ex parte Joyce is a District Court opinion which received sanction by approval of the First Circuit Court in *Billings* v. *Sitner*, 1915, 228 F. 315, where it was held by Dodge, J. (316):

"It appears from the facts agreed by the parties that the board so voted (to exclude Sitner on the ground of feeblemindedness) because it assumed that

a certificate by the medical officer who had examined him under section 17 of the act, to the effect that he was feebleminded and his vision was defective, of itself bound the board to exclude, notwithstanding any other evidence.

"We agree with the District Court that this assumption was erroneous, and prevented the hearing from being the fair hearing required by law. Section 10 of the act provides that the board's decision 'based upon the certificate of the examining medical officer' shall be final as to the rejection of aliens affected with mental or physical disability which would bring them within the excluded classes. But this cannot mean that the certificate is to take the place of a fair hearing by the board. Such construction would result in giving the inspecting medical officer instead of the board the final decision. Although immigration rule 17, subdivision 4, 5 (note), state that the board is 'virtually compelled' to base its decision upon the certificate, we hold that it has no right to do so without exercising its own judgment, after considering not only the certificate, but whatever other evidence there may be touching the alien's right to enter."

The judges below dismissed these cases as precedents on the ground that they were holdings under the act of 1907 which slightly deviates in language from the present act of 1917 (128).

For the purpose of convenience both sections are herewith set forth in tabular form:

Section 17 of the Immigration Act of 1917 (8 U. S. C. 153).	Section 10 of the Act of 1907.
That the decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and * * * shall be final as to the rejection of aliens affected with tuberculosis in any form or with a loathsome or dangerous contagious disease, or with any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under section three of this Act.	That the decision of the board of special inquiry based upon the certificate of the examining medical officer, shall be final as to the rejection of aliens affected with tuberculosis or with a loathsome or dangerous contagious disease, or with any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under section two of this Act.

It is respectfully submitted that this change in language from the act of 1907 to that of 1917 is no change in substance. All Congress intended to do was to provide that the board of special inquiry could only decide that an alien was excluded on the ground of insanity if there was a certificate of the medical officers to that effect. In the absence of such certificate the board may not exclude the alien on other evidence; but in the presence of such certificate the board still has to make a "decision", that is to admit other evidence, weigh the evidence, and possibly overrule the certificate in favor of the alien.

This is quite clear in view of the language of section 152, previously adverted to herein, that the certification of

the medical examiners is merely for "the information of the * * * boards of special inquiry". It is submitted that the judges below came to an erroneous conclusion of law because they did not give sufficient weight to the language of section 152 when attempting to construe section 153.

It is contended on the part of petitioner that the "finality" of the decision of the board of special inquiry merely means that there is no appeal to the Board of Immigration Appeals, but that it does not prevent the boards of special inquiry from functioning in a judicial capacity.

That this construction of the exclusion statutes is still applied in the First Circuit is apparent from the case of *Liang Buck Chew*, D. Mass. 1923, 296 Fed. 182, which came up under the 1917 Act and adhered to *Ex parte Joyce* and to *Billings* v. *Sitner, supra.*

The language of *Ex parte Liang Buck Chew*, 296 F. 182-183 is clear and convincing. It was there held by Morton, J.:

> "Chew, after having resided several years in this country, went back to China for a visit. On his return when he was examined by the health officials of the Immigration Service he was found to be afflicted with clonorchiasis or fluke worm of the liver. The Health Officers thereupon certified that the applicant was suffering from a 'dangerous contagious disease.' The board of special inquiry, considering that it was bound by this certificate, made an order on that ground alone excluding the applicant. He was held for deportation under this order when the present proceeding was instituted.
>
> "(1) The government contends in the first place that the medical certificate is conclusive upon all

parties in interest, and that no inquiry is open as to whether it was correct or incorrect, reasonable or unreasonable. The provisions of the statute (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§4289-1/4a-4289-1/4u) on this point are as follows: Section 3 (section 4289¼b) excludes aliens 'afflicted with tuberculosis in any form or with a loathsome or dangerous contagious disease.' Section 16 (section 4289-1/4i) provides for the physical examination of arriving aliens by medical officers of the Public Health Service, who are required to have had certain professional qualifications, and who 'shall certify, for the *information* (italics mine) of the immigration officers and the boards of special inquiry hereinafter provided for, any and all physical and mental defects or diseases observed by said medical officers in any such alien.' Section 17 (section 4289-1/4ii), dealing with hearings before boards of special inquiry provides 'that the decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and, except as provided in section twenty-one hereof, shall be final as to the rejection of aliens affected with tuberculosis in any form or with a loathsome or dangerous contagious disease.' Section 21 (section 4289-1/4kk) is not applicable to the present proceedings.

"It is going a long way to say that the action of the medical officer is absolutely final, however capricious, unfounded, and unreasonable it may be. If that had been the intention of the act, it would, I think, have been stated in explicit terms, but there is no such language. The status of the certificate appears to be established by section 16; it is made 'for the *information* of the immigration officers and the boards of special inquiry.' The proviso of section 17 appears to mean that rejection because of

> disease shall not be made by a board of special inquiry unless such disease is certified by a health officer, and to be in the nature of a limitation on the powers of the boards of special inquiry. It therefore seems to me that the certificates of a health officer made under this act stand on the same footing as final decisions of other immigration tribunals, and that it is open to the petitioner to show that the certificate was wholly unwarranted upon any reasonable view of the applicant's condition; in other words, was unsupported by any evidence. The testimony in regard to the condition of the applicant and the nature of clonarchiasis, which was received at the hearing subject to be ruled upon later, is therefore admitted."

There can be no doubt that the construction of the statute here proposed has the approval of the Court of Appeals for the First Circuit.

The rule here proposed, which is contrary to that of the court below, is that prevailing in the Ninth Circuit.

In *Gee Shew Hong* v. *Nagle*, 1927, 18 F. (2d) 248, the Ninth Circuit Court of Appeals, considered the case of another Chinese who was afflicted with clonarchiasis and the alien was excluded on the ground that this disease was deemed loathsome and contagious. The question whether the certificate of the medical examiners under the act of 1917 was binding and final came up and was decided by the Court of Appeals in the following holding:

> "We cannot agree that the medical certificate has any such finality or conclusiveness as is claimed for it. The power to admit and exclude aliens is vested in a board of special inquiry, subject to the right

> to appeal, not in the medical officers of the Public Health Service. The certificate is furnished 'for the information of the immigration officers and the board of special inquiry' and is evidence and nothing more. True, an exclusion decision is not final unless based on the certificate of the medical officers, but the certificate itself may be challenged, at least by the alien."

The rule proposed here, seems to have been adopted by the Supreme Court of the United States. This seems to follow from the case of *U. S. ex rel. Fink v. Tod*, 1924, C. C. A. 2nd, 1 F. (2d) 246, certiorari granted in 266 U. S. 599, 45 S. Ct. 125, reversed on confession of error on the part of Solicitor General Beck in 267 U. S. 571, 45 S. Ct. 227.

In this case the alien was excluded on the ground of feeble-mindedness, certified by the medical examiners. The Court of Appeals, Second Circuit, thoroughly discussed in its decision the above-mentioned decisions from the First Circuit (*Billings* v. *Sitner and Ex parte Joyce*) and came to the conclusion:

> "Notwithstanding the respect we entertain for the courts that rendered the decisions referred to, we simply are unable to accept the conclusions at which they arrived."

Discussing the binding force of the medical certificate the court held (253):

> "The statute declares that the board of special inquiry shall base their decision upon the medical certificate. We can only interpret this to mean that the medical certificate is conclusive as to the physical

> and mental condition of the alien examined. And we do not think it was intended that the board of special inquiry constituted by non-medical men should have the right to sit in review upon decisions of medical questions rendered by a board of medical officers or by a medical inspector. If such was not the intention, why require that the decision of the board of special inquiry 'shall be based upon the certificate of the examining medical officer'?"

On page 255 the court sums up its legal conclusions by stating:

> "The duty mandatorily impressed by the statute was to exclude her."

The rule laid down in this case by the U. S. Court of Appeals for the Second Circuit is on its face and explicitly contrary to that of the Court of Appeals for the First Circuit. There being a head-on collision of the two Circuit Courts of Appeal, the Supreme Court, as stated before, granted certiorari (266 U. S. 399, 45 S. Ct. 125). The Supreme Court then reversed the judgment of the Court of Appeals for the Second Circuit in 267 U. S. 571, 45 S. Ct. 227. This is a memorandum decision reading:

> "Judgment reversed with costs; and cause remanded to the District Court of the United States of the Southern District of New York with directions to discharge the petitioner, upon confession of error by Mr. Solicitor General Beck."

It follows from this reversal that the opinion of the Second Circuit Court in *U. S. ex rel. Fink* v. *Tod*, which is exactly congruent with the decision here appealed from was overruled in the Supreme Court and is not the law.

In order to find out more definitely on what ground the Solicitor General confessed error in the above case, the undersigned made inquiry with the present Solicitor General. Mr. Solicitor General Philip B. Perlman by letter of 20 July 1948, making answer to said inquiry, stated:

> "I have your letter of July 19th and I regret that I am unable to advise you as to the grounds upon which the Solicitor General confessed error in the case of U. S. ex rel. Fink v. Tod, 267 U. S. 571.
>
> "I have examined the brief filed by the Solicitor General James M. Beck in that case and there is no indication in it of a confession of error. The files of the case are not readily available and I am unable to inform you what happened subsequent to the filing of the brief."

It is the belief of the undersigned that the confession of error must have been prompted by the conviction of the late Solicitor General Beck that the opinion of the Circuit Court of Appeals that the boards of special inquiry were bound to the medical certificate was not the law and untenable.

The decision of *U. S. ex rel. Fink* v. *Tod* is expressly cited by the Ninth Circuit Court in *Gee Shew Hong* v. *Nagle* and overruled.

On the basis of these decisions it is maintained that the rule of law here proposed was set forth by the Court of Appeals for the First and Ninth Circuits and, in overruling the Second Circuit Court, by the Supreme Court of the United States.

In view of the foregoing decisions of the Supreme Court and the various Circuit Courts, it seemed unprofitable to

discuss the decision of Judge Patterson in *U. S. ex rel. Frumcair* v. *Reimer*, S. D. N. Y., 1938, 25 F. Supp. 552, upon which the court below so heavily relies. It is submitted that Judge Patterson's opinion is not in line with commanding authority. Besides, Judge Patterson's decision can be basically distinguished on the facts from the present case. In *U. S. ex rel. Frumcair* v. *Reimer* there was no dispute of the fact that the alien seeking admission suffered from ringworm of the toe nails. The alien argued that ringworm of the toe nails was neither loathsome nor dangerous. This case therefore is no authority for the question whether a board of special inquiry is bound to follow the certification of the medical examiners where, as in the present case, the fact is in issue whether or not an alien is afflicted with the disease or infirmity appearing in the certification.

The Court of Appeals sought enlightenment concerning the true construction of section 17 of the Immigration Act of 1917 (8 U. S. C. 153) by examining the Senate Committee report number 352, 64th Congress, 1st Session, which contains the following language with reference to section 17 of the Immigration Act of 1917:

> "But said provision has been slightly changed so as to clarify its meaning and meet recent Court decisions tending to modify the principle, upon which provisions of this kind in the Immigration Law have heretofore been based, that on medical questions the opinions of doctors as against that of laymen should prevail. Of course practical questions should be determined by the Immigration officials, but questions of a purely medical nature must be determined by members of the medical profession."

It is respectfully submitted that this language in no way precludes the construction of the law here proposed.

The petitioner does not maintain that the board of special inquiry may arbitrarily overrule the doctors. If the members of the board form an opinion as to the alien's mental condition, it must be based upon medical evidence. To use the language of the above report: "on medical questions the opinions of doctors as against that of laymen should prevail." But where doctors have conflicting opinions, as in the present case (Dr. Simon having testified as to the alien's health of mind), and where further medical testimony was offered, such contrary evidence should have been weighed, or the case remanded to the Public Health Service, as in *Gee Shew Hong* v. *Nagle*, 18 F. (2) 248. Instead of doing this, the board of special inquiry abdicated entirely, and declared itself absolutely bound to the doctors' certificate.

The opinion of the Court of Appeals herein derives from the language of the Senate Committee Report of the conclusion that the new version of section 17 of the Immigration Act of 1917 was destined by Congress to overrule *Billings* v. *Silner*, 228 Fed. 315, quoted above. The opinion holds that the words of Section 17 "that the decision of a Board of Special Inquiry shall be based upon the certificate of the examining medical officer" indicates that the Board *must* adopt the findings of the certificate.

It is respectfully suggested that there is no force in this argument, for the statute expressly holds that the certificate is for the *information* of the board of special inquiry (8 U. S. C. 152). If petitioner's evidence had been admit-

ted and the board should have sustained the experts of petitioner rather than those of the government, "the opinions of doctors" would have prevailed and the language of the Senate Committee report would have fully been satisfied. Indeed there is no appreciable difference in meaning between section 17 of the Act of 1917 and section 10 of the Act of 1917. That both are identical in meaning was the opinion of the Court of Appeals, Second Circuit, as expressed in *U. S. ex rel. Fink* v. *Tod*, 1 F. 2d 246, where the court, discussing the two Massachusetts cases previously pointed out (*Billings* v. *Sitner* and *Ex parte Joyce*) held (255):

> "The above decisions were not rendered under the Act of 1917, but under the Act of 1907. But we fail to find anything in the two acts which enables us to say that they afford any justification for saying that any sound reason exists for distinguishing those cases in principle from the one now before this court."

The Court of Appeals of the Second Circuit so held in 1924 after examining and discussing the same language of the Senate Committee report which now prompts the court to draw a distinction of the Acts of 1907 and of 1917.

The conclusion is justified that there is no difference in meaning between the Acts of 1910 and 1917, and that the Massachusetts cases hereinabove quoted are authority for the proposition here submitted, and that the distinction between the Act of 1907 and that of 1917 made by the Court of Appeals, Second Circuit, in the present decision is contrary to its own previous holding and therefore of doubtful soundness.

The conclusion reached therefore is, that the board of special inquiry in the present case committed legal error in overruling petitioner's offer to prove her mental competence and in deeming itself bound by the medical certificate.

Inasmuch as this case presents a clear conflict of decisions of several circuit courts, as furthermore this court itself recognized this conflict when it granted certiorari in *U. S. ex rel. Fink* v. *Tod*, 266 U. S. 399, 45 S. Ct. 125, it is respectfully suggested that the question whether boards of special inquiry are bound by medical certificates should be finally determined by this court. The granting of certiorari seems proper on all the grounds of Rule 35 of this court;—*i.e.* there are conflicting decisions of circuit courts; an important question of federal law is presented which has not been, but should be settled by this court; a federal question has been determined by the court below in a way probably in conflict with the decision of this court in *Fink* v. *Tod*, 267 U. S. 571, 45 S. Ct. 227; the board of special inquiry and the courts below have departed from the accepted and usual course of judicial proceedings to such extent as to call for this court's power of supervision.

POINT II

It was error on the part of the board of special inquiry and of the courts below to use as basis for petitioner's exclusion a medical report so vague, indefinite, and perfunctory, that it did not show the nature of petitioner's purported affliction nor the qualifications of the examining physicians, that it was based exclusively upon the insufficient evidence of the hearsay report of the Swedish ship's doctor.

Certiorari should be granted because of conflicting circuit court decisions on the above point and because the question of federal law involved is important and ought to be settled.

Judge Clark in his dissenting opinion herein proposed to sustain the writ

> "because of inadequacy of the original certificate of the examining surgeons and total failure of the reviewing board of medical officers to comply with regulations."

Judge Clark has so forcefully stated petitioner's case in his dissenting opinion that petitioner feels unable to add to it, but respectfully incorporates this dissenting opinion into this brief by reference. The court is particularly adverted to the following decisions cited and quoted in Judge Clark's dissenting opinion:

Hughes v. *U. S. ex rel. Licata*, C. C. A. 3, 295 F. 800;

U. S. ex rel. Powlowee v. *Day*, 1930, C. C. A. 2, 33 F. (2d) 267; cert. den. 280 U. S., 594;

U. S. ex rel. Papa v. *Day*, 1930, S. D. N. Y., 45 F. (2d) 435;

U. S. ex rel. Devenato v. *Curran*, C. C. A. 2, 299 F. 206;

U. S. ex rel. Fong On v. *Day*, 1932, C. C. A. 2, 54 F. (2d) 990.

The court below, in overruling Judge Clark, in effect held that so perfunctory a medical certificate as the one here presented is sufficient to exclude an alien. If such rule is to prevail, complete arbitrariness of the government surgeons will ensconce itself, where under our system of law and the due process clauses of the Constitution a more accurate and thorough procedure ought to be applied.

Again, we have conflicting decisions of the various Circuit Courts.

In *Wong Bing Pon* v. *Carr*, 1930, 41 F. 2d 604, the Circuit Court of Appeals for the Ninth Circuit held:

> "Two public health surgeons signed a certificate stating it to be their opinion that he is 9 years of age, the certificate containing, however, no statement as to specific physical findings upon which they base their conclusion. Appellee concedes that the opinion expressed by such certificate is of no greater value than the expression of an opinion by a layman."

While the Court of Appeals for the Ninth Circuit held that "so stark and unadorned a medical certificate"* as the one here discussed, which fails to state the "specific physi-

* Language of Clark, J., dissenting opinion.

cal findings upon which they (the government surgeons) base their conclusion * * * is of no greater value than the expression of an opinion by a layman", the court below holds that it is an opinion of doctors that should prevail as against that of laymen (p. 185, opinion below).

A further defect of the medical certificate is that it does not show the qualifications of the examining surgeons. 8 U. S. C. 152, third sentence, expressly ordains

> "Medical officers of the United States Public Health Service who have had special training in the diagnosis of insanity and mental defects shall be detailed for duty * * * at all points of entry. * * * "

The certificate does not show that this provision has been complied with. Moreover, petitioner expressly alleged on information and belief that the medical examiners were not qualified under the said statute (118). Even if the court shall hold that the certificate need not show the qualifications of the government surgeons on its face, proof of this material allegation should have been taken in the district court. This allegation was not invented out of thin air, for the undersigned has information that the absence of alienists from Ellis Island was a matter of inquiry before the House Subcommittee on Immigration in 1947-1948 where one Abe Orlow testified in conformity with this allegation.

This point must be emphasized, for the entirely erroneous results of the examination by the government physicians, who possibly were not prompted by improper motives, can only be explained by their unfamiliarity with the diagnosis

of mental defects, which unfamiliarity makes their findings no better than those of laymen (see Senate Committee Report, *supra* p. 20).

If we furthermore consider that these findings were based on the hearsay report of the Swedish Ship's Doctor who in turn had no experience in psychiatry and who "volunteered the opinion that the alien is not suffering from mental disorder." (13), we have the key to the total miscarriage of justice in the present case: It results from an accumulation of violations of all procedural safeguards provided by law.

It is suggested that certiorari should be granted because of conflicting decisions of the two circuit courts (the ninth and second), because of the importance of settling the questions of what a medical certificate pursuant to 8 U. S. C. 152 must contain and whether the statutory qualifications of the government surgeons can be enforced or are doomed to become a sanctimonious falsehood.

POINT III

It was legal error of the court below not to reverse the decision of the District Court in that the procedure before the board of special inquiry and the composition of the board were contrary to the Administrative Procedure Act and in that said board's decisions therefore were without due process of law, void and of no effect.

Certiorari is sought so that this court may determine and settle the problems arising from the impact of the Administrative Procedure Act upon the admission procedure of the Immigration and Naturalization Service. This important question of federal law ought to be settled.

It is well settled that the Administrative Procedure Act of 1946 is applicable to Immigration procedure:

U. S. ex rel. Lindenau v. *Watkins*, 1947, S. D. N. Y., 73 F. Supp. 216;

U. S. ex rel. Trinler v. *Carusi*, 1948, C. C. A. 3, 166 F. (2d) 457;

Eisler v. *Clark*, 1948, D. C. D. C., 77 F. Supp. 610.

The following infractions of said act are invoked:

A. The members of the Board were not qualified under section 11;

B. The Board, at the hearings of 16 March and 6 April 1948, was composed of different members.

A.

In *Eisler* v. *Clark*, 77 F. Supp. 610, Judge Goldsborough enjoined the Attorney General from proceeding against Eisler by giving him deportation hearings before immigrant

inspectors and held that the person holding such hearing must be a qualified examiner under the Administrative Procedure Act, Section 11. This case is defectively reported in 77 F. Supp. 610 and petitioner submits to this Court, annexed hereto as Appendix II; the order entered in the *Eisler* case, which will more completely reveal the import of this decision.

The question to be determined in this case is whether the requirements of the Administrative Procedure Act, sections 5 and 11, apply equally to admission proceedings, for the *Eisler* case was a deportation case while the present one is an exclusion case.

The courts below held that boards of special inquiry are exempt from the provisions of section 11 by the saving clause of section 7a, exempting "conduct of special classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute." As boards of special inquiry were instituted by Section 153, Title 8, U. S. C. A., the question is whether this section supersedes section 11 of the Act.

For the construction of Section 7a reference is respectfully made to the proceedings in the Senate of the United States of 12 March and 17 May 1946 where Senator McCarran, as reported in "Administrative Procedure Act, Legislative History, Senate Document No. 248, 79th Congress, Second Session," stated on the floor of the Senate as follows (p. 325):

> "The committee has considered the possibility that the preservation in section 7(a) of the 'conduct of specified classes of proceedings in whole or part by

or before boards or other officers specially provided for by or designated pursuant to statute' might prove to be a loophole for avoidance of the examiner system. If experience should prove this true in any real sense, corrective legislation would be or might be necessary. Therefore, the committee desires that Government agencies should be put on notice that the provision in question is not intended to permit agencies to avoid the use of examiners, but only to preserve special statutory types of hearing officers *who contribute something more than examiners could contribute*, and at the same time to assure the parties fair and impartial procedure."

Congressman Walter on page 364 of the same Senate Document, stated:

"The section 7 exemption 'does not mean, that agencies are authorized—whether pursuant to the express authority of other statutes or not to avoid the examiner system—set up in this bill * * * by assigning general employees or attorneys to hear cases individually or as boards.

"In short, unless the agency or its members or some specially qualified statutory officer hears the case, an examiner qualified under section 11 of this bill must do so:' "

(See also p. 268 ibid.)

The Attorney General's Manual on the Administrative Procedure Act, pp. 71-72 holds:

"A statutory provision which merely provides for the conduct of hearings *by any officers or employees the agency may designate*, does not come within the

exception so as to authorize the agency to dispense with hearing examiners appointed in accordance with section 11."

It is respectfully pointed out therefore to this court that Section 7a of the act does not intend that agencies use it as a "loophole for avoidance of the examiner system."

Section 153 of Title 8, U. S. C. A. now holds in sentence 2:

"Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards."

The designation of the Commissioner is contained in section 60.29 Code of Federal Regulations, reading:

"Sec. 60.29 Persons qualified as members of boards of special inquiry; oath. In accordance with the provisions of section 17 of the Immigration Act of 1917 (39 Stat. 887; 8 U. S. C. 153), the following persons are hereby designated as qualified and determined to be eligible to serve on boards of special inquiry:

"(a) Immigrant inspectors, including persons designated immigrant inspectors by Sec. 60.27;

"(b) All other employees of the Immigration and Naturalization Service whose supervisory officers assign to them the duty of acting as secretaries of such boards for the purpose of keeping the complete permanent record of the proceedings and of all such testimony as may be produced; and

"(c) Persons, other than employees of the Immigration and Naturalization Service but preferably Government employees, who are selected by an Immigration and Naturalization Service official in charge of a port where no permanent board of special inquiry is maintained and to which it is impracticable to detail a board from some other station. Such persons shall, before serving on a board of special inquiry, subscribe to an oath of office on Form I-266 before an immigrant inspector."

It is further provided in said Code of Federal Regulations, Section 130.1:

"Sec. 130.1 Organization. Each of the three members of a board of special inquiry prescribed by section 17 of the Immigration Act of 1917 (39 Stat. 887; 8 U. S. C. 153) shall be a person qualified for such membership as provided by Sec. 60.29 of this chapter. The officer in charge shall designate one of the members as chairman. One of the members may act as secretary for the purpose of keeping the complete permanent record of the proceedings before the board and of all such testimony as may be produced before it."

It is respectfully submitted that this entire procedure is contrary to the Administrative Procedure Act in that:

(a) The separation of functions as provided in section 5c of the Act is not applied;

(b) The assignment by supervisory officers of secretaries to act as members of the Board, is particularly contrary to the spirit of sections 11 and 7a.

In the present case, as the record shows (28, 44) secretary Fairbanks acted as board stenographer and member of the board.

It is submitted that while the Commissioner of Immigration under section 153, Title 8, U. S. C. has the power to designate the members of the Boards of Special Inquiry, he must designate for such purpose persons qualifying under section 11 of the Act, and that a stenographer, assigned by the "supervisory officer" can under no circumstances be considered a proper member of a board exercising very important judicial functions. Was such stenographer, temporarily employed and uninstructed in immigration matters, to use the language of Senator McCarran and of Representative Walter, *supra*, pp. 29, 30, to "contribute something more than examiners could contribute"; is she a "specially qualified statutory officer"?

B.

The procedure before the Board was furthermore defective in that it did not meet the requirements of Section 5(c) of the Act, which reads:

> "(c) *Separations of Functions.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision* required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; *nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee or agent engaged in the performance of investigative or prosecuting functions for any agency.* No officer, employee, or agent engaged in the performance of investigative or prosecuting functions

for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency."

This section has not been complied with in at least two points: (1) there were two hearings before the board of special inquiry, one on 16 March, the other on 6 April. The board on 16 March was composed of inspectors Clark and Danielson, and of Miss Fairbanks, the stenographer (28). On 6 April 1948 it was composed of inspectors Clark and Mintzer, and of Miss Fairbanks (44). Inspector Danielson, in other words, was replaced by inspector Mintzer in the second hearing. This is contrary to the Act which prescribes that the *same* officers who preside at the reception of evidence shall make the decision. The record shows that Exhibits 1 and 2 were received in evidence during the first hearing (37-38) and inspector Mintzer who participated in the decision was not then present. There is nothing in the record to show that inspector Danielson became "unavailable to the agency". For this reason the decision rendered on 6 April 1948 is void, of no effect, and contrary to statute.

The Administrative Procedure Act, as shown above, changed the existing law with respect to the point here raised by introducing higher standards of fairness for ad-

ministrative hearings than had theretofore prevailed. Section 5(c) has changed the rule previously prevailing, which was laid down in *U. S. ex rel. Chin Cheung Nai* v. *Corsi*, 55 F. (2d) 360, aff'g 64 F. (2d) 1022.

It is respectfully submitted that a very important question of federal law is presented here which should be determined by this court as early as possible. The Administrative Procedure Act of 1946 has deeply affected all federal agencies. Many of them had or will have to make far reaching changes in procedure, organization and approach to the public to comply with the mandates of the statute. It is only human that this process of adaptation to new rules will be retarded and even partly frustrated by old habits and patterns of thought that the average officer will cling to, unless enlightened by this Court as to the new requirements of the statute.

Among the agencies the Immigration and Naturalization Service is of far reaching importance, reaching deep into the lives of the millions of aliens living in this country and of millions entering the United States for pleasure, business and in transit. The fairness of the procedure administered to these aliens will contribute to the respect with which the world at large will consider the United States of America. The sooner this Court will determine to what extent admission proceedings are subject to Articles 5, 7 and 11 of the Administrative Procedure Act, the sooner the twilight will be removed that must taint all acts and decisions of the boards of special inquiry until this Court will have determined the questions hereinbefore raised.

The government will not deny that the members of the board of special inquiry who sat in the instant case do not qualify under sections 11 and 5 of the Administrative Procedure Act, in that they have not been designated, appointed or qualified in accordance with the requirements of the Act; that they are responsible to and subject to the supervision and direction of their superiors in the Service, their officers, employees and agents who are engaged in the performance of the investigating and prosecuting functions of the Service, and that the other safeguards of the Act to assure the conduct of the hearings in an independent and impartial manner have not been observed.

It is prayed that this Court grant certiorari to determine the impact of the Administrative Procedure Act upon the admission procedure of the Immigration and Naturalization Service.

CONCLUSION

The technical points herein discussed may tend to becloud the human side of the present case. There is a young woman, a member of a friendly and respected nation, who embarked for the United States in a strictly legal manner. Her passport and visa were regularly obtained; she arrived here expecting no trouble, in conformity with law.

From 1 March to 1 October 1948 she has been held at Ellis Island. Her behavior for seven months was exemplary and that of a sane and normal person (55). This has never been contested. She has been at large for three months and again conducted herself properly.

The record is devoid of any evidence that petitioner is not in best mental health, except a medical certificate that is ambiguous, uncertain and obscure, and obviously based on hearsay evidence which was caused by malice and revoked by its author.

That medical certificates of the U. S. Public Health Service are not infallible is shown by the case, quoted above, of *U. S. ex rel. Fink* v. *Tod.* In that decision, as the record on appeal reveals, there were six examinations held. In the first four examinations held at Ellis Island the alien was certified as feeble-minded. In the fifth examination, held in Washington, before surgeons of the Surgeon General's staff, the alien was pronounced sane and not feeble-minded. In the sixth examination the surgeons were divided, the Ellis Island surgeons voting for feeble-mindedness, the Washington surgeons for sanity.

If this alien will have a fair hearing before unbiased examiners and qualified surgeons and if she will be enabled to show her mental health by appropriate medical testimony, she will properly qualify for admission.

The petitioner therefore respectfully approaches the Supreme Court of the United States craving justice and praying that this court review her case and grant this petition for certiorari.

Respectfully submitted,

GUNTHER JACOBSON,
Counsel for Petitioner

APPENDIX I

1. Immigration Act of February 26, 1907, c. 1134, Section 10; 34 Stat. 901.

"That the decision of the board of special inquiry, hereinafter provided for, based upon the certificate of the examining medical officer, shall be final as to the rejection of aliens affected with tuberculosis or with a loathsome or dangerous contagious disease, or with any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under section two of this Act."

2. United States Code Annotated, Title 8.

"Section 136. Aliens excluded.

The following classes of aliens shall be excluded from admission into the United States:

Idiots, imbeciles, etc.

(a) All idiots, imbeciles, feeble-minded persons, epileptics, insane persons; persons who have had one or more attacks of insanity at any time previously; persons of constitutional psychopathic inferiority; persons with chronic alcoholism.

* * *

(c) Persons afflicted with tuberculosis in any form or with a loathsome or dangerous contagious disease.

* * *

Mental or physical defectives

(d) Persons not comprehended within any of the classes enumerated in paragraphs a, b, or c, *who are found to be and are certified by the examining surgeon as being mentally* or physically *defective*, such

physical defect being of a nature which may affect the ability of such alien to earn a living.".

"~~Section 132~~ Physical and mental examination of alien passengers; regulations (numbers of sentences supplied).

"(1) The physical and mental examination of all arriving aliens shall be made by medical officers of the United States Public Health Service *who shall conduct all medical examinations and shall certify, for the information of the immigration officers and the boards of special inquiry* hereinafter provided for, any and all physical and mental defects or diseases observed by said medical officers in any such aliens; or, should medical officers of the United States Public Health Service be not available, civil surgeons of not less than four years' professional experience may be employed in such emergency for such service upon such terms as may be prescribed by the Commissioner of Immigration and Naturalization, under the direction or with the approval of the Attorney General. (2) All aliens arriving at ports of the United States shall be examined by not less than two such medical officers at the discretion of the Attorney General, and under such administrative regulations as he may prescribe and under medical regulations prepared by the Surgeon General of the United States Public Health Service. (3) *Medical officers of the United States Public Health Service who have had especial training in the diagnosis of insanity and mental defects shall be detailed* for duty or employed at all ports of entry designated by the Attorney General, and such medical officers shall be provided with suitable facilities for the detention and examination of all arriving aliens in whom insanity

or mental defect is suspected, and the services of interpreters shall be provided for such examination. (4) Any alien certified for insanity or mental defect may appeal to the board of medical officers of the United States Public Health Service, which shall be convened by the Surgeon General of the United States Public Health Service, and said alien may introduce before such board one expert medical witness at his own cost and expense.

"Section 153. Boards of Special Inquiry; appointment. (Sentences 4 and 8.)

"(4) Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported.

"(8) The *decision of a board of special inquiry shall be based upon the certificate* of the examining medical officer and * * * shall be final as to the rejection of aliens affected with tuberculosis in any form or with a loathsome or dangerous conatgious disease, or with any mental or physical disability *which would bring such aliens within any of the classes* excluded from admission to the United States under section 136 of this title."

Administrative Procedure Act of 1946.

ADJUDICATION

SEC. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other

than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(c) SEPARATIONS OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

Appendix I

Hearings

SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) HEARING POWERS.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make

decisions or recommended decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) EVIDENCE.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record of such portion thereof as may be cited by any party and as supported by and in accordnace with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

Judicial Review

SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion--

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other

writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Examiners

SEC. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases

in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpena witnesses or records, and pay witnesses fees as established for the United States courts.

Code of Federal Regulations—Title 42, Part 34

PART 34—MEDICAL EXAMINATION OF ALIENS

Sec.

34.1 Applicability.
34.2 Definitions.
34.3 Examinations; by whom made; female aliens.
34.4 Scope of examinations.

34.5 Aliens free of disease or defect; notation on visa.
34.6 Aliens afflicted with disease or defect.
34.7 Certificates and notifications; Class A.
34.8 Certificates and notifications; Class B.
34.9 Certificates and notifications; Class C.
34.10 Detention and observation; adequacy of facilities.
34.11 Medical and other care; death.
34.12 Quarantinable diseases.
34.13 Re-examination; convening of boards; expert witnesses; reports.

AUTHORITY: §§34.1 to 34.13, inclusive, issued under sec. 16, 39 Stat. 874, secs. 322 (c), 325, 58 Stat. 696, 697; 8 U. S. C. 152, 42 U. S. C., Sup. 249 (c), 252.

DERIVATION: §§34.1 to 34.13, inclusive, contained in Regulations, Surgeon General, Aug. 26, 1947; approved by Acting Federal Security Administrator, effective Sept. 30, 1947, 12 F. R. 5848.

§34.1 *Applicability.* The provisions of this part shall apply to (a) the medical examination and reexamination of aliens presented therefor to the Public Health Service upon the arrival of such aliens at a port of entry, or upon an application for a visa at a foreign consulate of the United States, and (b) the medical and other care, and burial, of aliens admitted to Public Health Service stations and hospitals at the request of the Immigration Service.

§34.2 *Definitions.* As used in this part, terms shall have the following meanings:

(a) *Immigration Service.* The Immigration and Naturalization Service of the Department of Justice.

(b) *Loathsome or dangerous contagious disease.* Any of the following diseases:

Appendix 1

1. Actinomycosis.
2. Amebiasis.
3. Blastomycosis.
4. Favus.
5. Filariasis.
6. Gonorrhea.
7. Granuloma inguinale.
8. Keratoconjunctivitis infections.
9. Leishmaniasis.
10. Leprosy.
11. Lymphogranuloma Venereum.
12. Mycetoma.
13. Paragonimiasis.
14. Ringworm of scalp.
15. Schistosomiasis.
16. Chancroid.
17. Syphilis, infectious stage.
18. Trachoma.
19. Trypanosomiasis.
20. Yaws.

(c) *Medical certificate.* A document issued by an examining medical officer to the Immigration Service, signed by him and certifying his findings with respect to an alien's physical and mental condition.

(d) *Medical notification.* A document issued by an examining medical officer to a consular authority, signed by the officer and notifying such authority of his findings with respect to an alien's physical and mental condition.

(e) *Medical officer.* A physician assigned or detailed by the Surgeon General of the Public Health Service to make mental and physical examinations of aliens.

(f) *Medical officer in charge.* A medical officer charged by the Surgeon General with responsibility for the conduct and supervision of all medical examinations made at a designated place or in a designated area.

§34.3 *Examinations: by whom made; female aliens.* Aliens presented to the Public Health Service for medical examination shall be examined by medical officers. Female aliens shall be examined only by female medical officers, or in the presence of a female, who may be an assistant to a medical officer.

§34.4 *Scope of examinations.* In performing examinations and re-examinations, medical officers shall give consideration to only those matters which relate to the physical or mental condition of the alien, and shall issue certificates or notifications of a disease or defect as hereinafter provided only if the presence of such disease or defect is clearly established.

§34.5 *Aliens free of disease or defect; notation on visa.* If an alien is found to have no physical or mental disease or defect, medical officers shall so indicate by notation on his visa.

§34.6 *Aliens afflicted with disease or defect.* If an alien is found to have one or more physical or mental diseases or defects, medical officers shall report their findings to the Immigration Service, by medical certificate, or to the presenting consular authority, by medical notification.

§34.7 *Certificates and notifications; Class A.* A Class A certificate or a Class A notification shall be issued with respect to any alien who is found to be afflicted with any of the following diseases or defects:

(a) Tuberculosis in any form;

(b) A loathsome or dangerous contagious disease;

(c) Idiocy, imbecility, feeblemindedness, epilepsy, insanity, chronic alcoholism, or constitutional psychopathic inferiority;

(d) A mental defect not enumerated in paragraph (c) of this section; *Provided, however,* That a Class A certificate or Class A notification shall in no case be issued with respect to an alien having only mental shortcomings due to ignorance, or suffering only from a mental condition attributable to remediable physical causes, or from a psychosis of a temporary nature caused by a toxin, drug, or disease.

§34.8 *Certificates and notifications; Class B.* A class B certificate, or Class B notification, shall be issued with respect to an alien who has a physical defect which is of such a nature that it may affect his ability to earn a living. The certificate, or notification, shall state the nature and extent of the physical defect, whether it is chronic or permanent, and the extent to which it is likely to render the alien incapable of pursuing a vocation or profession for which he has particular training or experience, or, if he has no such vocation or profession, incapable of performing ordinary physical or manual work.

§34.9 *Certificates and notifications; Class C.* A Class C Certificate, or Class C notification, shall be issued with respect to an alien who has a disease or defect other than those for which a Class A or Class B certificate (or notification) is required to be issued.

§34.10 *Detention and observation; adequacy of facilities.* (a) Whether, upon an examination, it appears to the medical officer in charge that there is doubt about the physical or mental condition of an alien, the alien shall be held over for such observation and further examination as may be reasonably necessary to determine his physical or mental condition.

(b) When in the judgment of the medical officer in charge, a medical examination or re-examination cannot be satisfactorily completed at a station or place at which it is undertaken, such examination or re-examination shall be discontinued and such officer shall recommend to the presenting authority that the alien be removed to a place where the examination or re-examination may be satisfactorily completed.

§34.11 *Medical and other care; death.* (a) Upon request of the Immigration Service, an alien detained by it shall be admitted to a hospital or station of the Public Health Service and receive therein necessary medical, surgical, and dental care. An alien found, in the course of an examination or re-examination, to be in need of emergency care shall be given such care to the extent deemed practicable by the medical officer in charge, and if in need of further care, he shall be returned to the presenting authority with the medical officer's recommendations concerning such further care.

(b) In case of death of an alien the body shall be delivered to the presenting authority; but if such death occurs in the United States, or in a territory or possession thereof, public burial shall be provided upon request of the Immigration Service and subject to its agreement to pay the burial expenses. Autopsies shall not be performed unless approved by the Immigration Service.

§34.12 *Quarantinable diseases.* Any alien arriving at a port of the United States who, in the course of a medical examination, is found to be infected with a disease defined as quarantinable under Part 71 of this chapter (Foreign Quarantine Regulations of the Public Health Service) shall be held under observation, isolated and released in accordance with the applicable provisions of such regulations.

Appendix I.

§34.13 *Re-examination; convening of boards; expert witnesses; reports.* (a) The Surgeon General, or when authorized, a medical officer in charge, shall convene a board of medical officers to re-examine an alien.

(1) Upon the request of the Immigration Service for a re-examination by such a board, or

(2) Upon an appeal by the alien from a certificate of insanity or mental defect, issued at a port of entry.

(b) Such a board shall consist of three, when practicable, but in no case less than two, medical officers. In the event that a board consists of three medical officers, the decision of the majority thereof shall prevail.

(c) Re-examination shall include:

(1) A medical examination by the board;

(2) A review of all records submitted;

(3) Use of any laboratory or diagnostic methods or test deemed advisable; and

(4) Consideration of statements regarding the alien's physical or mental condition made by a reputable physician after his examination of the alien.

(d) An alien who is to be re-examined shall be notified of the time and place of his re-examination not less than five days prior thereto.

(e) An alien being re-examined may introduce as witnesses before the board such physicians or medical experts as the board may in its discretion permit, at his own cost and expense, *Provided*, That an alien who has appealed from a certificate of insanity or mental defect shall be permitted to introduce at least one expert medical witness. If witnesses offered are not permitted by the board to testify,

the record of the proceedings shall show the reason for the denial of permission.

(f) Witnesses before the board shall be given an adequate opportunity to examine medical certificates involved in the re-examination and to present all relevant and material evidence, orally or in writing, until such time as the proceedings are declared by the board to be closed.

(g) The findings and conclusions of the board shall be based on its medical examination of the alien and on the evidence presented to it and made a part of the record of its proceedings.

(h) The board shall report its findings and conclusions to the Immigration Service, and shall also give prompt notice thereof to the alien if the re-examination has been held upon his appeal. The board's report to the Immigration Service shall specifically affirm, modify, or reject the findings and conclusions of prior examining medical officers.

(i) If the board finds that an alien re-examined by it has a disease or defect not previously certified, it shall issue its certificate in accordance with the applicable provisions of this part.

(j) After submission of its report, the board shall not be reconvened in the same case except upon the express authorization of the Surgeon General.

APPENDIX II

COPY

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

—o—

Civil Action No. 1173-48

GERHART EISLER,

Plaintiff,

against

TOM CLARK, individually, and as Attorney General, and WATSON B. MILLER, individually, and as Commissioner of Immigration and Naturalization,

Defendants.

—o—

Civil Action No. 1174-48

IRVING POTASH,

Plaintiff,

against

TOM C. CLARK, etc., and WATSON B. MILLER, etc.,

Defendants.

—o—

Civil Action No. 1176-48

JOHN WILLIAMSON,

Plaintiff,

against

TOM C. CLARK, etc., and WATSON B. MILLER, etc.,

Defendants.

—o—

Appendix II

Civil Action No. 1177-48

CHARLES A. DOYLE,

Plaintiff,

against

TOM C. CLARK, etc., and WATSON B. MILLER, etc.

Defendants.

Preliminary Injunction

These causes came to be heard on motion of the plaintiffs for preliminary injunctions. With the consent of the parties the cases are consolidated for the purposes of the motions in view of the similiarity of the facts and issues involved. Having heard counsel for the parties, and having considered the pleadings, the affidavits submitted in support of the motion, the briefs and arguments of counsel, the Court makes the following

Findings of Fact

1. The plaintiffs have been arrested upon warrants of the Attorney General instituting proceedings for their deportation. They were taken into custody and held without bail by the defendants, but have been enlarged by the United States District Court for the Southern District of New York pending their appeals from orders of the Court denying their release on bail pending disposition of the deportation proceedings.

2. Deportation hearings have been initiated or scheduled for the plaintiffs before hearing officers of the Immigration and Naturalization Service. Under rulings of the

defendants, such hearings are not being, and will not be, conducted in accordance with the provisions of the Administrative Procedure Act (Act of June 11, 1946, 60 Stat. 237, 5 U. S. C., secs. 1001 et seq.), and particularly have been or will be heard by examiners not appointed, qualified, assigned or empowered pursuant to the provisions of said Act. The plaintiffs have requested that their deportation hearings be held in accordance with the provisions of said Act, and the defendants have denied their request.

3. The proceedings to deport the plaintiffs will be lengthy, cumbersome, and expensive, and will substantially curtail the plaintiffs' freedom of action.

Conclusions of Law

1. The Court has jurisdiction in the premises.

2. The hearings for deportation of the plaintiffs are governed by the provisions of the Administrative Procedure Act, and in particular by sections 5, 7, 8, and 11 thereof, relating to the conduct of agency hearings and the appointment, qualification, assignment and authority of hearing examiners.

3. The plaintiffs are threatened presently with irreparable harm by the refusal of the defendants to conduct the aforesaid deportation hearings in accordance with the requirements of said Act; they have no adequate remedy at law; and it is appropriate that equitable relief should be granted at this time.

Appendix II

Order

Wherefore, it is by the Court this 7th day of May, 1948,

ORDERED that the defendants, Tom C. Clark, Attorney General of the United States, and Watson B. Miller, Commissioner of Immigration and Naturalization, and each of them and their officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them, be, and they hereby are, enjoined and restrained, pending final determination of these causes, from conducting or continuing to conduct hearings for the deportation of the plaintiffs or any of them which are not before hearing officers appointed, qualified, assigned and authorized in accordance with the provisions of the Administrative Procedure Act or which otherwise do not comply with the provisions of said Act, and from deporting or attempting to deport the plaintiffs or any of them on the basis of hearings or proceedings not held before such officers or which otherwise do not comply with the provisions of said Act, being Sections Nos. 5, 7, 8 and 11.

s/T. ALLAN GOLDSBOROUGH
Justice

No objection as to form.

s/JOHN P. BURKE
Assistant U. S. Attorney
Counsel for defendants.

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Supreme Court of the United States

October Term, 1948
No. 506

UNITED STATES OF AMERICA, ex rel. May Johnson,

Petitioner,

against

EDWARD J. SHAUGNESSY, Acting District Director of the Immigration and Naturalization Service in the New York District, or such other person, if any, who may have the custody of May Johnson,

Respondent.

PETITIONER'S REPLY MEMORANDUM

GUNTHER JACOBSON,
Attorney for Petitioner.

SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y. 7, BARCLAY 7-0349

Supreme Court of the United States

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Respondent.

PETITIONER'S REPLY MEMORANDUM

Mr. Justice Frankfurter, at the end of the argument herein, referred to the Senate committee report on the immigration bill which became the 1917 Act, H. R. 10384, and to the language with respect to Section 17 of the bill (S. Rep. 352, 64th Cong. 1st sess., p. 15), reading:

> * * * Section 10 of the act of 1907, making the certificate of the examining medical officer and the decision of a board of special inquiry based thereon conclusive and final in certain cases of disease and mental defect, has been added to this section as a proviso; but the said provision has been slightly changed so as to clarify its meaning and meet recent court decisions tending to modify the principle, upon which provisions of this kind in the immigration law have heretofore been based, that on medical questions the

opinions of doctors as against that of laymen should prevail. Of course practical questions should be determined by the immigration officials, but questions of a purely medical nature must be determined by members of the medical profession.

The question propounded to the undersigned was whether he knew of any other "recent court decisions" (i. e. decisions antedating the year 1917 to which this language could refer), except *Ex parte Joyce*, 212 F 282, and *Billings* v. *Sitner*, 228 F 315.

The implication of this question was that, as the court below held, the changed language of section 17 of the 1917 Act, as compared with section 10 of the 1907 Act, was intended to overrule *Ex parte Joyce* and *Billings* v. *Sitner*.

Renewed search has revealed the following two cases:

(1) *In re Madeiros, Lewis* v. *Billings*, District Court, Mass., August 3, 1914, 225 F. 90, by Morton, D. J. (91):

In this case an alien was excluded under the 1907 law because of a physical defect of a nature which might impair his ability to earn a living. The court upheld an exclusion decision, holding:

> "(1) No one of the three medical certificates which appear in the record states explicitly and categorically that the applicant is afflicted with a defect which may impair his ability to earn a living. In re Felix Petkas, 214 Fed. 978, 133 C. C. A. 274, June 24, 1914. But I think that, fairly construed, that is what Dr. Grubb's certificate, and Dr. Safford's letter or certificate, dated February 7, 1914, mean. In proceedings of this character, in which substance rather than form, and essential justice rather than

technicalities, are to be regarded, I do not think it can properly be held that the certificates were so defective that action based upon them was illegal and void."

It is apparent that in the above case the alien was excluded upon the finding of the Board of Special Inquiry that the physical defect of the alien was of such nature that the alien was unable to earn a living. The Massachusetts court sanctioned the exclusion, although the medical certificates did not state that the alien's ability to earn a living was impaired.

A similar situation underlies *U. S.* v. *Petkas*, 1914, C. A. 1st. Circ., 214 F. 978.

The undersigned respectfully contends that section 17 of the 1917 Act intended to modify the law established by the *Madeiros* case and by the *Petkas* case quoted in the *Madeiros* case. Congress wanted to take away from the Boards of Special Inquiry the power to find that a physical defect disabled an immigrant to earn a living, unless the certificate of the government physicians contained a finding to this effect. The 1907 Act,[1] like the 1917 Act,[2] excludes

---

[1] Immigration Act of February 20, 1907, Chapt. 1134, 59th Congr., United States Statutes at Large.

"Sec. 2. That the following classes of aliens shall be excluded from the United States: All idiots, imbeciles, feeble minded persons * * * persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living; * * *"

[2] Sec. 3 of the Immigration Act of 1917—8 U. S. C. 136 (d) see page 39 of Petition for Certiorari and Brief in support.

aliens having such physical defects as may affect the ability of such alien to earn a living; but while under the *Madeiros* decision of Judge Morton the certificate of the surgeons did not have to contain a reference to the alien's earning ability, and this could be established by the laymen sitting in the Board of Special Inquiry, section 17 of the 1917 Act makes clear that the government doctors have to determine this question first and that the Board of Special Inquiry must not make a finding that is not "based" on such certificate of the doctors.

The rules of the Surgeon General, issued pursuant to authority contained in 8 U. S. C. 152 therefore now provide (see 42 C. F. R. 34.8, as amended in 1917):

> "The certificate * * * shall state the nature and extent of the physical defect, whether it is chronic or permanent, and the extent to which it is likely to render the alien incapable of pursuing a vocation or profession for which he has particular training or experience, or, if he has no such vocation or profession, incapable of performing ordinary physical or manual work.

To sum up:

The court below erred in holding that the language of the Senate Report referred to *Ex parte Joyce* and *Billings* v. *Sitner*. It is manifest that the Senate Report overruled the *Madeiros* and *Petkas* decisions, *supra*.

This being so, it is proved that *Billings* v. *Sitner* is still good law under the 1917 Act. If an alien is certified by the government surgeons as mentally defective, he must have the right to bring in his experts to prove his sanity. The

Board of Special Inquiry has then to decide the case, weigh the evidence, and hold either with the government surgeons or with the medical experts furnished by the alien. In doing so, laymen will not overrule physicians, but decide which medical testimony they believe more trustworthy.

April 22, 1949.

Respectfully submitted,

GUNTHER JACOBSON,
Attorney for Petitioner.

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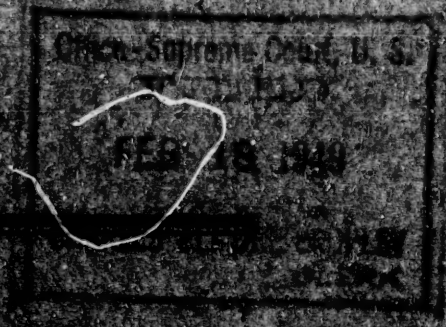

No. 909

In the Supreme Court of the United States

October Term, 1948

United States of America, Ex Rel.
[illegible] Johnson, Petitioner

v.

[illegible] Watkins, District Director of the Immigration and Naturalization Service in the New York District, or Such Other Person as May Have the Custody of Mary Johnson

---

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 506

UNITED STATES OF AMERICA, EX REL. MAY JOHNSON, *Petitioner*

v.

W. FRANK WATKINS, District Director of the Immigration and Naturalization Service in the New York District, or Such Other Person, If Any, Who May Have the Custody of May Johnson

---

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (R. 51-60) have not yet been reported. The opinion of the district court on reargument (R. 41-45) has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered November 29, 1948 (R. 61). The petition for a writ of certiorari was filed January 12, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in an exclusion proceeding, the medical certificate of a board of medical officers, to the effect that petitioner was a "Mental Defective, Class A," and so excludable, was conclusive as to the medical finding upon the board of special inquiry.

2. Whether the medical certificate, concurred in by the board of medical officers on petitioner's appeal, on which was based the exclusion order of the board of special inquiry, complied with the applicable regulations.

3. Whether the Administrative Procedure Act is applicable to exclusion proceedings in respect of the composition of the board of special inquiry, the continuity of its membership during the proceedings, and the separation of the investigative and decision making functions.

STATUTES AND REGULATIONS INVOLVED

Sections 16 and 17 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 885, 887, as

amended, 8 U. S. C. 152, 153, provide in pertinent part:

> SEC. 16. The physical and mental examination of all arriving aliens shall be made by medical officers of the United States Public Health Service who shall conduct all medical examinations and shall certify, for the information of the immigration officers and the boards of special inquiry hereinafter provided for, any and all physical and mental defects or diseases observed by said medical officers in any such alien; * * *. All aliens arriving at ports of the United States shall be examined by not less than two such medical officers at the discretion of the Attorney General, and under such administrative regulations as he may prescribe and under medical regulations prepared by the Surgeon General of the United States Public Health Service. Medical officers of the United States Public Health Service who have had especial training in the diagnosis of insanity and mental defects, shall be detailed for duty or employed at all ports of entry designated by the Attorney General, * * * Any alien certified for insanity or mental defect may appeal to the board of medical officers of the United States Public Health Service, which shall be convened by the Surgeon General of the United States Public Health Service, and said alien may introduce before such board one expert medical witness at his own cost and expense. * * *

Sec. 17. Boards of special inquiry shall be appointed by either the district director of immigration and naturalization designated by the Commissioner or by the inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards. * * * Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land * * *. * * * The decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and * * * shall be final as to the rejection of aliens affected with * * * any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States * * *

Sections 5, 7 and 11 of the Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 239, 241, 244, 5 U. S. C. 1004, 1006, 1010, provide in pertinent part:

Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved

* * * (3) proceedings in which decisions rest solely on inspection, tests, or elections; * * *

* * * * * * * *

(c) Separation of Functions.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses * * *

* * * * * * * *

Sec. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) Presiding Officers.—There shall preside at the taking of evidence (1) the agency, (2)

one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute.

* * * * * * * *

Sec. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, * * *.

Section 60.29 of Title 8, Alien and Nationality, of the Code of Federal Regulations (Supp. 1947) provides for the designation of the following persons as eligible to serve on boards of special inquiry:

(a) Immigrant inspectors, including persons designated immigrant inspectors by § 60.27;

(b) All other employees of the Immigration and Naturalization Service whose supervisory officers assign to them the duty of acting as secretaries of such boards for the purpose of keeping the complete permanent record of the proceedings and of all such testimony as may be produced; and

(c) Persons, other than employees of the Immigration and Naturalization Service but preferably Government employees, who are selected by an Immigration and Naturalization Service official in charge of a port where no permanent board of special inquiry is maintained and to which it is impracticable to detail a board from some other station. * * *

Section 34.13 of Title 42, Public Health, of the Code of Federal Regulations (Supp. 1947) provides for the convening of a board of medical officers to re-examine an alien—

(a) * * * (2) Upon an appeal by the alien from a certificate of insanity or mental defect, issued at a port of entry.

* * * * * * * *

(c) Re-examination shall include:

(1) A medical examination by the board;

(2) A review of all records submitted;

(3) Use of any laboratory or diagnostic methods or tests deemed advisable; and

(4) Consideration of statements regarding the alien's physical or mental condition made by a reputable physician after his examination of the alien.

* * * * * * * *

(e) * * * an alien who has appealed from a certificate of insanity or mental defect shall be permitted to introduce at least one expert medical witness. * * *

* * * * * * * *

(g) The findings and conclusions of the board shall be based on its medical examination of the alien and on the evidence presented to it and made a part of the record of its proceedings.

(h) The board shall report its findings and conclusions to the Immigration Service, and shall also give prompt notice thereof to the alien if the re-examination has been held upon his appeal. The board's report to the Immigration Service shall specifically affirm, modify, or reject the findings and conclusions of prior examining medical officers.

STATEMENT

Petitioner, an unmarried woman, thirty-three years of age, a native and citizen of Sweden, arrived at the port of New York on the *S.S. Stockholm* on March 1, 1948 (R. 11). She applied for admission to the United States as a quota immigrant (R. 12, 20). On March 11, 1948, she was examined by two medical officers who issued a medical certificate certifying that she had been examined and found to be "Mental Defective, Class 'A' " (R. 13, 22).[1] On March 16, 1948, petitioner appeared before a board of special inquiry con-

[1] In addition to the examination by the medical officers, they had before them a statement by the ships' doctor of the *Stockholm*, who reported, *inter alia*, "the impression of an incipient psychosis" in petitioner and referred to her transfer during the voyage to the isolation ward of the ship's hospital (R. 23-25).

sisting of Inspectors Clark (chairman) and Danielson and Secretary A. P. Fairbanks (R. 10). She was advised of the issuance of the medical certificate and told (R. 14) that it

> * * * renders you mandatorily excludable in so far as this board is concerned, from which exclusion there is no appeal. However, you may appeal from the certificate issued by the Public Health Service to a medical board to be convened by the Public Health Service at which time you may be represented by a physician of your own selection to give testimony in your behalf.

Petitioner indicated that she did wish so to appeal, and the board of special inquiry deferred its proceedings pending appeal to a medical board (R. 14). The board of medical officers convened March 25, 1948, and petitioner was there represented by Dr. Carlton Simon, a medical witness of her choosing who testified in her behalf, and a record was made of the entire proceedings (R. 26-32). The following day, March 26, 1948, the board of medical officers reported that it had

> * * * considered the appeal * * * and after taking into consideration the certificate of March 11, 1948, and the testimony given by Dr. Carlton Simon, * * * it concurs with the * * * [medical] certificate. (R. 26.)

Thereafter, on April 6, 1948, the board of special inquiry reconvened, and the records of the pre-

vious meeting were incorporated into the record (R. 15).[2] Petitioner, who was represented by counsel, was advised that the affirmance of the medical certificate by the board of medical officers rendered her "mandatorily excludable from the United States from which exclusion there is no appeal" (R. 17). Petitioner's counsel requested an opportunity to adduce further medical testimony of private psychiatrists and to furnish reports of Swedish physicians who may have examined petitioner prior to her departure for the United States (R. 18-19). The board of special inquiry, without foreclosing petitioner from presenting such reports (see R. 19), entered findings to the effect that her application for admission was regular except for the mental defect referred to in the medical certificate, by which she was certified by the medical board as "Mental Defective, Class A." It was therefore concluded that she was inadmissible to the United States under section 3 of the Immigration Act of February 5, 1917, and her exclusion was voted by the board. (R. 19-21.)

A petition for a writ of habeas corpus was filed on petitioner's behalf in the District Court for the Southern District of New York on April 21, 1948 (R. 3). It was alleged that the certificate of the board of medical officers finding petitioner to be

[2] Inspector Mintzer, who replaced Inspector Danielson at this hearing, stated that he had familiarized himself with the record in the case (R. 15).

mentally defective was erroneous and should not have been given conclusive effect by the board of special inquiry in rendering its nonappealable exclusion order. (R. 5-6.) A writ issued (R. 2) and respondent filed a return denying the legal sufficiency of the petition (R. 7-9). After a hearing, the district court, on June 10, 1948, discharged the writ and remanded petitioner (R. 32).

Petitioner's original attorney was meanwhile succeeded by another who applied to the district court on June 18, 1948, for reargument, principally on the following allegations of error: the board of special inquiry was in error in its position that it had no power to make an independent finding as to petitioner's mental condition; the board of special inquiry was improperly constituted in that its members did not qualify under Sections 5(c), 7 and 11 of the Administrative Procedure Act; the findings of the board of medical officers and the board of special inquiry were not based upon substantial evidence and were arbitrary and capricious; the medical certificate was not sufficiently explicit as to the nature of the mental defect of petitioner; the record did not show the qualifications of the examining physicians; and petitioner did not have the assistance of an interpreter in the physical examination[3] (R. 34-40). Reargument was allowed, but the court adhered to its original decision. The court held that the board of special inquiry acted in

[3] The last of these contentions is no longer pressed.

accordance with Section 17 of the Immigration Act of 1917 in relying upon the medical certificate; that, since boards of special inquiry are "specially provided for by or designated pursuant to statute" (quoting from 5 U. S. C. 1006, *supra*, pp. 5-6), they are excepted from the provisions of Section 11 of the Administrative Procedure Act (5 U. S. C. 1010, *supra*, p. 6) pertaining to the selection of hearing examiners; and that the presumption of regularity in the conduct of official business preserves the validity of the certificate in the absence of an affirmative showing that the examining doctors were not properly qualified. (R. 41-45.)

In affirming the order of the district court, the Court of Appeals, one judge dissenting, held that the medical board's conclusion was binding on the board of special inquiry under the language of Section 17 of the Immigration Act and its legislative history; that the district court properly held that a board of special inquiry need not be constituted in accordance with the provisions of Section 11 of the Administrative Procedure Act; and that the hearing before the medical board was fair (R. 51-58). The dissenting judge agreed with these propositions of law, but was troubled by "the stark and unadorned form of medical certificate." He found the certificate "defectively general" and objected that there was no compliance with the provision of 42 C. F. R. (Supp. 1947) 34.13(h), *supra*, p. 8, that the board's report "shall spe-

cifically affirm, modify, or reject the findings and conclusions of prior examining medical officers."

ARGUMENT

1. Petitioner argues that it was error on the part of the board of special inquiry to consider itself bound as to medical matters by the medical certificate of the examining medical officers as concurred in on appeal by the board of medical officers, and to reject the evidence offered by petitioner to show her sanity (Pet. 8, *et seq.*). Petitioner urges not only that the decision below sustaining this view is based on an erroneous interpretation of the applicable statute, but that it is in conflict with decisions in other circuits.

We believe that the courts below correctly construed the applicable portions of Sections 16 and 17 of the Immigration Act of 1917 (*supra*, pp. 3-4) as requiring the board of special inquiry to accept as binding the medical findings. Without restating that which has already been developed in some detail in the majority opinion below (R. 53-56),[4] we feel that it is sufficient to emphasize that the change made in Section 17 of the 1917 statute,[5]

---

[4] With full concurrence on this point by the dissenting judge (see R. 58, 59).

[5] The pertinent portion of Section 17 (*supra*, p. 4) reads: "The decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and * * * shall be final as to the rejection of aliens affected * * * with any mental or physical disability which would bring such

when read with the comment of the Senate committee which recommended the change (see R. 55), can mean only that Congress intended the medical boards to have final authority on medical matters. As the court below said (R. 55):

> What else can be meant by the words [of the Senate Committee]: "on medical questions the opinions of doctors as against that of laymen should prevail."

But petitioner argues that, no matter what is the proper interpretation of the statute in regard to the finality of the decision of the medical board, nevertheless the cases dealing with this subject suggest a conflict among the lower courts. We submit, however, that the asserted conflict is more apparent than real. Petitioner bases her contention on the following cases: *Gee Shew Hong* v. *Nagle*, 18 F. 2d 248 (C. A. 9); *United States ex rel. Fink* v. *Tod*, 1 F. 2d 246 (C. A. 2), certiorari granted, 266 U. S. 599, reversed on confession of error by the Solicitor General, 267 U. S. 571; *Billings* v. *Sitner*, 228 Fed. 315 (C. A. 1); *Ex parte Liang Buck Chew*, 296 Fed. 182 (D. Mass.); *Ex parte Joyce*, 212 Fed. 282 (D. Mass.).

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aliens within any of the classes excluded from admission to the United States under section three of this Act."

The precursor of this provision in Section 10 of the 1907 Act (Act of February 20, 1907, 34 Stat. 898, 901) read: "the decision of the board of special inquiry * * * based upon the certificate of the examining medical officer, shall be final," etc.

Two of these cases (*Billings* v. *Sitner* and *Ex parte Joyce*) were decided under the 1907 statute (see fn. 5). And the very purpose of the change made in Section 17 of the 1917 act, according to the report of the Senate committee recommending the change (R. 55), was to

> * * * clarify its meaning and meet recent court decisions tending to modify the principle * * * that on medical questions the opinions of doctors as against that of laymen should prevail.[6]

No more express congressional overruling of judicial decisions could be found than is contained in the above language.

Despite the congressional rejection of these two pre-1917 decisions, in 1923 the Massachusett district court adhered to the discarded doctrine in *Ex parte Liang Buck Chew*, *supra*, but the court in that case made no reference to the Senate committee report referred to above. We contend with the court below (see R. 55-56) that the *Liang Buck Chew* decision must be disregarded because it was based upon a misconception of the import of the 1917 amendment.

United States ex rel. Fink v. *Tod*, *supra*, decided by the court below in 1924, is in accord with its decision in the instant case. Petitioner contends

---

[6] The court below said that "it seems clear" that "the recent court decisions" referred to were those in the *Billings* and the *Joyce* cases (R. 55).

however, that when the judgment of the Second Circuit in the *Fink* case was reversed by this Court upon the Government's confession of error after the granting of certiorari, the ruling of the Court of Appeals as to the conclusiveness of the medical findings was also upset. There is, however, no evidence available as to the reasons for the confession of error,[7] so we must agree with the court below that (R. 56-57)—

> The contention * * * is without merit. We have no reason to regard a reversal on confession of error as indicating any decision on the merits by the appellate court.

Finally, petitioner relies for a conflict upon the decision of the Ninth Circuit in *Gee Shew Hong* v. *Nagle*, *supra*. In that case the alien seeking admission was originally found to be free of physical and mental defects. That fact was certified by the medical examiners to the board of special inquiry. Thereafter, for some reason not disclosed by the record, the case was referred back to the medical officers for a further physical examination. The alien was then found to be afflicted with a loathsome or dangerous contagious disease. Upon that certification he was denied admission by the board of special inquiry. The alien challenged his exclusion on

[7] Search of available sources has failed to reveal the reason for the confession of error, which was apparently made orally, and which may have been based upon considerations other than the legal issue here involved. See also Pet. 19.

the ground that the first certificate was final and conclusive and that the second examination and certificate were unauthorized. In rejecting that contention, the court did use some language supporting petitioner's argument here; nevertheless, all the language useful to petitioner was dictum. That was not a case in which the board of special inquiry exercised an independent lay judgment on medical matters, overruling the medical opinion expressed in the medical certificate. Rather, it was a case which was reopened upon the initiative of officials of the Immigration and Naturalization Service, asking a reexamination, but who made no attempt to supersede the medical decision with a lay opinion. This same procedure is open to the Service at the present time under the Immigration and Naturalization Service regulations (8 C. F. R., Supp. 1947, §§ 90.10, 90.11, 136.5 and 136.6),[8] which provide specifically for the reopening of a hearing in specified circumstances either before or after the issuance of a final order. We do not conceive that a reversal by the medical officers themselves of their original decision indicates in any way that lay opinion can or should be allowed to supersede medical judgment on purely medical matters.[9]

---

[8] See also 42 C.F.R., 1947 Supp., 34.13(a)(1) and 34.13(i).

[9] It is interesting to note, too, that *Gee Shew Hong* v. *Nagle* has never been cited with approval in a reported decision. Its only citation discovered to date is in the instant case in which the dictum was correctly, we believe, disapproved (R. 57).

2. Petitioner contends (Pet. 24-27) that "it was rror on the part of the board of special inquiry nd of the courts below to use as basis for petiioner's exclusion a medical report so vague, inefinite, and perfunctory, that it did not show the ature of petitioner's purported affliction nor the ualifications of the examining physicians, that it as based exclusively upon the insufficient evidence f the hearsay report of the Swedish ship's doctor" (Pet. 24).

The last two aspects of this contention do not equire extended discussion. In respect of the bsence of statements on the face of the medical ertificate showing the qualifications of the examning medical officers, we find no evidence presented y petitioner that they were not qualified in acordance with Section 16 of the statute (*supra*, p.), nor do we find any requirement in the statte or the regulations governing the examination hat such information be included in the certificate. 'etitioner, although represented by counsel at the econd hearing before the board of special inquiry fter her appeal to the medical board (see pp. 9-10, *upra*), did not raise any such issue.

As to the report of the ship's doctor, we believe he court below was clearly correct in holding that t was for the medical officers to determine what veight should be attached to it (R. 57-58).

Petitioner's criticism that the medical report did ot show the nature of her affliction we believe to be

equally groundless. This matter was not discussed in the majority opinion below, though the contention must have been considered and rejected, since the dissent is based solely upon "the stark and unadorned form of medical certificate" (R. 58), which the dissenting judge thought was an insufficient compliance with the regulations, even though it may not have violated the statutory requirement.

In the first place, there is no indication whatever that petitioner was prejudiced by any lack of information as to the nature of the mental defect found by the medical officers or that she failed to understand what the defect was. No such deficiency in the medical certificate or the report of the medical board was urged before the board of special inquiry. The point was first made in the affidavit of petitioner's new counsel in support of her application for reargument in the district court (see p. 11, *supra*). Petitioner does not claim prejudice, but bases her complaint upon mere formal insufficiency by way of technical non-compliance with the regulations.

The regulations governing the medical examination of aliens are found in 42 C. F. R. Supp. 1947, part 34. Section 34.2(c) defines the medical certificate as—

> A document issued by an examining medical officer to the Immigration Service, signed by him and certifying his findings with respect to an alien's physical and mental condition.

And in Section 34.7 provision is made for the issuance of a Class A certificate in respect of any alien who is found to be afflicted with any of the following diseases or defects:

> (a) Tuberculosis in any form;
>
> (b) A loathsome or dangerous contagious disease;
>
> (c) Idiocy, imbecility, feeblemindedness, epilepsy, insanity, chronic alcoholism, or constitutional psycopathic inferiority;
>
> (d) A mental defect not enumerated in paragraph (c) of this section; * * *

The medical certificate issued by the original examining officers in reporting that petitioner had been examined and found to be a mental defective, and was therefore in Class A, was a satisfactory compliance with these provisions.

Section 34.13 of these regulations outlines the procedure governing the reexamination of an alien before a board of medical officers either upon the request of the Immigration Service or upon an appeal by an alien from a certificate of insanity or mental defect (42 C. F. R., Supp. 1947, 34.13(a)(1) and (2)). It was the question whether the further steps in that appeal procedure were satisfactorily complied with that troubled the dissenting judge, and his views are now adopted by petitioner. The dissenting judge thought, erroneously we believe,

that the report made by the Board of medical officers did not comply with subsections (g) and (h) of Section 34.13, *supra*, p. 8.

In the reexamination of petitioner by the medical board (R. 26-32) she was represented by a medical witness of her choosing, and both the witness and petitioner were carefully examined by the members of the board. The entire proceeding was included verbatim in the report of the board, as required by subsection (g), the findings and conclusions being specifically stated to have been based upon the previous certificate, the appeal proceedings, and the testimony of petitioner's witness. As required by subsection (h), the findings and conclusions were reported to the Immigration Service, and petitioner was likewise informed of the result at the board of special inquiry, if not before. The board's report did "specifically affirm, modify, or reject the findings and conclusions of prior examining medical officers" (subsection (h)), as follows:

> Pursuant to the request of the District Director of Immigration and the order of the Medical Officer in Charge, the following Board of Medical Officers of the U. S. Public Health Service, has considered the appeal regarding subject named May Gunborg Johnson and after taking into consideration the certificate of Mar. 11, 1948 and the testimony given by Dr. Carlton Simon, reports that it concurs with the above dated certificate.

Since we have already shown that the medical certificate need "find" nothing more than the fact that an alien is afflicted with a mental defect, we submit that the above statement of concurrence, based upon a verbatim reported account of unobjectionable proceedings, constituted compliance with the regulations.

3. Petitioner also asserts that the procedure before the board of special inquiry was fatally defective in the following respects: (a) in that the members of the board of special inquiry were not examiners appointed pursuant to Section 11 of the Administrative Procedure Act: (b) in that the composition of the board violates the separation of functions requirements of Section 5 (c) of that Act; and (c) in that one of the immigration inspectors who sat as a member of the board on March 16 was replaced by another inspector when the hearing resumed on April 6.

Sections 5, 7 and 8 of the Administrative Procedure Act are made applicable by Section 5 to cases of adjudication "required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved * * * (3) proceedings in which decisions rest solely on inspections, tests, or elections". It is assumed that the requirement of the exclusion statute (8 U. S. C. 153) of a hearing before a board of special inquiry generally subjects the proceedings

before such a board to the provisions of Sections 5, 7 and 8 of the Administrative Procedure Act.[10]

(a) While petitioner now contends that the board of special inquiry in this case was invalidly constituted in that its members were not examiners appointed pursuant to Section 11 of the Administrative Procedure Act (Pet. pp. 28-33), she specifically conceded in her brief in the court below that Section 11 was not applicable to boards of special inquiry.[11] Petitioner may not attack in this Court the judgment of the court below on grounds which were not presented to that court. In any event, the decision of the District Court on this issue was clearly correct.

---

[10] *U. S. ex rel. Lindenau* v. *Watkins*, 73 F. Supp. 216 (S.D. N.Y.), reversed on other grounds, 164 F. 2d 457 (C.A. 2), *U. S. ex rel. Trinler* v. *Carusi*, 166 F. 2d 457 (C.A. 3), and *Eisler* v. *Clark*, 77 F. Supp. 610 (D. D.C.), cited by petitioner, all deal with the application of the Administrative Procedure Act to deportation proceedings, and have no bearing on the application of that Act to exclusion proceedings.

[11] In the petitioner's brief in the court below, the following statement appears (Relator-Appellant's Brief, p. 37): "The relator herein agrees that pursuant to Judge Rifkind's holding the Immigration Service may be exempt with respect to hearings before boards of special inquiry from the requirement that independent examiners pursuant to section 11 of the Act have to compose the board. As the statute provided in 8 U.S.C.A. 153 that the board members may be selected from immigration officials, no objection is made to this board on the ground that immigration officials and employees were acting as board members."

Section 7 (a) of the Administrative Procedure Act prescribes who shall preside over hearings governed by the Act, as follows:

> PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute.

It is our contention that boards of special inquiry fall squarely within the saving exception for "boards * * * specially provided for by or designated pursuant to statute." The exclusion statute (8 U. S. C. 153) specifically provides that:

> Boards of special inquiry shall be appointed by either the district director of immigration and naturalization designated by the Commissioner or by the inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards.

Here we have not merely an authorization to appoint to boards of special inquiry such immigration officials as may be designated by the Commissioner, but a statutory command that the boards be so constituted. Clearly, therefore, boards of special inquiry are "boards specially provided for by or designated pursuant to" the exclusion statute, within the meaning of Section 7(a), and, therefore, need not be composed of examiners appointed in accordance with Section 11 of the Administrative Procedure Act.[13]

Petitioner further objects to the fact that A. P. Fairbanks, who acted as secretary to the board of special inquiry, also sat as a member of the Board, on the ground that she does not possess such competence as to bring her within the spirit of the exception of Section 7(a) for special statutory hearing officers. It is well established that her designation as a member of the board of special inquiry was authorized by the exclusion statute. *United States ex rel. Minuto* v. *Reimer*, 83 F. 2d 166, 167-168 (C. A. 2). Also, for all that appears in the record, Miss Fairbanks may have had extensive experience as a member of such boards, and, therefore, may be better qualified to so act than some immigrant inspectors. Again, if we are correct in

[13] This has been the consistent view of the Immigration and Naturalization Service. See statement of former Commissioner Carusi in *The Federal Administrative Procedure Act and the Administrative Agencies* (1947), p. 292. See also Note, 49 Col. L. R. 73, 78-80 (1949).

our view that the finding of the medical board was binding upon the board of special inquiry, then the latter in this case had no real function to perform, since the sole ground for petitioner's exclusion was medical, and petitioner could in no way be prejudiced by the composition of the board of special inquiry. Finally, as we point out later, where the exclusion of an alien is based solely upon medical grounds, the decision would seem to rest solely on inspections or tests within the meaning of the introductory clause of Section 5 which excepts from all of the provisions of Sections 5, 7 and 8 "proceedings in which decisions rest solely on inspections, tests, or elections". In such a case, therefore, the composition of the board of special inquiry is in no way governed by Section 7.

(b) Petitioner contends that the composition of the board of special inquiry violates the separation of functions requirements of Section 5 (c) of the Administrative Procedure Act, in that the members of the board are "responsible to and subject to the supervision and direction of their superiors in the Service, their officers, employees and agents who are engaged in the performance of the investigating and prosecuting functions of the Service" (Pet. p. 36). It is our contention that Section 5 (c) has no application to exclusion proceedings generally. This follows from the exception from the requirements of Section 5 (c), contained in the last sentence of that subsection, of proceedings

"determining applications for initial licenses." The term "license" is defined in Section 2 (e) as including "the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." Seeking to enter the United States clearly involves an application for a "license" within the broad and functional definition of Section 2 (e). The phrase "determining applications for initial licenses" as used in the last sentence of Section 5(c) refers to the grant or denial of an application for a license, as opposed to such matters as the revocation or suspension of licenses.[13] Accordingly, it is believed that the proceedings of boards of special inquiry in determining whether aliens are entitled to be admitted into the United States involve the determination of "applications for initial licenses", and are therefore not subject to the requirements of Section 5 (c).[14]

As a separate matter, it should be noted that in this, as in many exclusion cases, the sole basis of exclusion is on medical grounds. The introductory

[13] The rationale of this exception for proceedings "determining applications for initial licenses" is discussed in *The Attorney General's Manual on the Administrative Procedure Act* (1947), pp. 50-53.

[14] This is the contemporaneous and consistent interpretation of Section 5 (c) by the Immigration and Naturalization Service. See statement of former Commissioner Carusi in *The Federal Administrative Procedure Act and The Administrative Agencies* (1947), p. 292.

clause of Section 5 of the Administrative Procedure Act excepts from the requirements of that section (and therefore from the requirements of Sections 7 and 8) "(3) proceedings in which decisions rest solely on inspections, tests, or elections."[15] Where, as in this case, the sole basis for exclusion is medical, the determination of the alien's mental condition is made by the Public Health doctors and by the alien's doctor on the basis of a medical examination of the alien. The subsequent hearing before the board of special inquiry is, as in this case, a pure formality (R. 15-21) since there were no non-medical grounds for exclusion, because the finding of the medical board is binding and conclusive upon the board of special inquiry (*supra*, pp. 13-17). Thus, where, as here, an alien is excluded solely upon medical grounds, the decision must be deemed to rest solely on inspections or tests, with the result that the proceedings in such exclusion cases are not subject to the provision of Sections 5, 7 and 8 of the Administrative Procedure Act.[16]

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[15] For the genesis and rationale of this exception, see the *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), p. 37; for the legislative history and for other examples, see *The Attorney General's Manual on the Administrative Procedure Act* (1947), pp. 44-45.

[16] It may also be noted that even if Section 5 (c) were applicable to exclusion proceedings, the separation of functions requirements of that subsection are to be deemed modified to the extent that some other statute, within the exception of

c) Petitioner's final contention that the proceedings before the board of special inquiry violated the Administrative Procedure Act is to the effect that the substitution of Inspector Mintzer for Inspector Danielson at the second hearing before the board, contravened the requirement of Section 5 (c)[1] that "The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency." The non-applicability of the requirements of Section 5(c) to this proceeding has previously been urged on several grounds. It remains only to point out that the substitution of Mintzer for Danielson arose out of the continuance of the board hearing from March 16 to April 6, 1948. The record specifically shows that the hearing was continued for the sole purpose of enabling petitioner to appeal to the medical board (R. 14). We believe that petitioner is not in a position to complain of a substitution resulting from a continuance of the board hearing for the purpose of enabling petitioner to pursue her only effective remedy on the medical issue. As noted above, the substitution could not have prejudiced petitioner since the finding of the medical board on the medical issue was conclusive upon the board of special inquiry.

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[1] Section 7 (a), requires that the hearing be conducted by certain officers who are under the supervision and control of persons exercising investigative or prosecuting functions.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

UNITED STATES OF AMERICA, ex rel. MAY JOHNSON,
Petitioner

v.

W. FRANK WATKINS, District Director of the Immigration and Naturalization Service in the New York District, or such other person, if any, who may have the custody of May Johnson

---

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 506

UNITED STATES OF AMERICA, ex rel. MAY JOHNSON,
Petitioner

v.

W. FRANK WATKINS, District Director of the Immigration and Naturalization Service in the New York District, or such other person, if any, who may have the custody of May Johnson

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the district court on reargument (R. 41-45) is reported at 82 F. Supp. 36. The majority (R. 51-58) and dissenting (R. 58-60) opinions in the Court of Appeals are reported at 170 F. 2d 1009.

JURISDICTION

The judgment of the Court of Appeals was entered on November 29, 1948 (R. 61). The petition for a writ of certiorari was filed on January 12, 1949, and was granted on March 7, 1949. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in an exclusion proceeding before a board of special inquiry, a medical certificate, concurred in by a medical appeal board, certifying an alien to be a "Mental Defective, Class A," and so excludable, is conclusive on the board of special inquiry as to the medical finding.

2. Whether a medical certificate that an alien is a "Mental Defective, Class A," a classification established by regulation pursuant to statute, is too general a finding to support an exclusion order.

3. Whether the Administrative Procedure Act is applicable to exclusion proceedings in respect of the composition of the board of special inquiry.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 49-61.

STATEMENT

Petitioner, an unmarried woman, thirty-three years of age, a native and citizen of Sweden, ar-

rived at the Port of New York on the S.S. *Stockholm* on March 4, 1948 (R. 11). She applied for admission to the United States as a quota immigrant (R. 12, 20). On March 11, 1948, she was examined by two medical officers, who issued a medical certificate certifying that she had been examined and "found to be afflicted with—MENTAL DEFECTIVE Class 'A' " (R. 13, 22).[1]

The medical officers, in addition to their examination of petitioner, apparently had before them, though the record does not clearly indicate the fact, a statement by the ship's doctor of the *Stockholm*, who treated petitioner during the voyage to New York, and made a report of his observations, bearing the notation, "Special Attention U.S.P.H.S. Ellis Island Hospital" (R. 13, 23-25). In this report, the ship's doctor stated that petitioner, during the voyage, manifested symptoms of "an incipient psychosis" and was placed in the "isolation ward of the ship's hospital" (R. 23). According to the report, petitioner, after first showing symptoms of mere seasickness, thereafter—

> * * * states that she feels herself persecuted—everybody looks at her. She also admits hallucinations. Has difficulty in sleeping. Hears cries, but does not know who is crying. Sees

[1] For the meaning of this certification, see 42 C. F. R. (1947 Supp.) 34.7, Appendix, *infra*, pp. 56-57. See also fn. 7, *infra*, p. 28.

> "faces," don't know who they are, sees them only at night. Feels herself hunted. Tells that she gave wrong information to the Consul when obtaining her visa and thinks herself very sinful. * * * (R. 23).

The report further stated that petitioner revealed that she had been "treated at home for insanity by a doctor for a half year, two years ago" (R. 24). Towards the end of the voyage, the report further stated—

> * * * the patient clears up remarkably. Says she has no recollection of a lot of strange things she had said before. * * * Denies having any hallucinations. Looks considerably better. (R. 24.)

On March 16, 1948, petitioner appeared before a board of special inquiry consisting of Inspectors Clark (chairman) and Danielson, and "Secy. A.P. Fairbanks" (R. 10). She was advised of her right to be represented at the hearing by counsel of her own choice and to have a friend or relative present, and she stated that she desired neither (R. 11). The chairman of the board asked whether she had any comment to make on either the medical certificate or the report of the ship's doctor (R. 13). She made no comment on the medical certificate, but, in respect of the ship's doctor's report, denied having stated that she had ever been treated for insanity and stated that she had no recollection of having told the doctor that she gave

false information to the consul in connection with her application for a visa (R. 13-14). The chairman then advised her (R. 14) that the issuance of the medical certificate certifying her to be a "mental defective"

> * * * renders you mandatorily excludable in so far as this board is concerned, from which exclusion there is no appeal. However, you may appeal from the certificate issued by the Public Health Service to a medical board to be convened by the Public Health Service at which time you may be represented by a physician of your own selection to give testimony in your behalf.

Petitioner stated that she desired so to appeal, and the board of special inquiry thereupon deferred its proceedings pending the appeal to a medical board (R. 14).

A board of three medical officers convened on March 25, 1948, and petitioner was represented before it by Dr. Carlton Simon, a medical witness of her own choosing who testified in her behalf, and a record of the entire proceeding was made (R. 26-32). Dr. Simon testified that in his opinion, reached as a result of an hour's conference with petitioner, she was not "psychotic"; he explained "the episode aboard ship" as being the result of "toxemia," petitioner having drunk "quite heavily" (according to her statement to him) during "several days of partying with

friends" before embarking, and having taken "bromide" and "some sleeping capsule" her first night aboard (R. 27-29). The members of the medical board then questioned petitioner at some length (R. 29-32). She denied having done any drinking before boarding the ship, but stated that she was exhausted from having attended a number of farewell parties (R. 29, 32). She testified that she took "two bromides" and "one sleeping pill" before the ship's doctor saw her (R. 29-30). She admitted telling the ship's doctor about hearing "voices," etc., but denied the truth of the statements made to him (R. 30-31). She was "tired" and "hysteric," she stated, and said "yes" to all the doctor's questions in the hope that she would be left alone to sleep (R. 30-32).

The following day, March 26, 1948, the board of medical officers reported (R. 26) that it had

> * * * considered the appeal [of petitioner] and after taking into consideration the certificate of Mar. 11, 1948 and the testimony given by Dr. Carlton Simon, reports that it concurs with the above dated certificate.

Thereafter, on April 6, 1948, the board of special inquiry reconvened, and the minutes of the previous meeting were incorporated into the record (R. 15). Inspector Danielson, one of the members of the board at the previous hearing, was replaced at the April 6 hearing by Inspector Mintzer, who indicated that he had familiarized

himself with the record in the case (*ibid.*). Petitioner was represented by counsel at the April 6 hearing (*ibid.*). The chairman advised petitioner and her counsel that the report of the medical appeal board, concurring in the original medical certificate, was being made a part of the record, and asked if they had any comment; petitioner's counsel replied, "No comment" (R. 16). Petitioner was then advised that the affirmance of the original medical certificate by the medical appeal board rendered her "mandatorily excludable from the United States from which exclusion there is no appeal"; petitioner replied that she understood (R. 17). Petitioner's counsel, after briefly interrogating petitioner, then made "a statement for the record" that "the report of the Public Health doctor is, apparently, primarily based upon the report of the ship's surgeon"; that Dr. Simon, who appeared before the medical appeal board on behalf of petitioner, was of the opinion that petitioner was "not psychotic and is not suffering from [any] mental disturbance whatsoever"; and that "during the confinement of this alien at Ellis Island she has deported and conducted herself in a normal and sane manner and has given no indication whatsoever of any mental disturbance" (R. 18-19). Counsel also requested leave to adduce further medical testimony of private psychiatrists and to furnish reports of Swedish physicians who may have examined petitioner

prior to her departure for the United States (R. 19). The board of special inquiry, without foreclosing petitioner from presenting such reports (see R. 19), thereupon entered findings to the effect that her application for admission was regular except for the mental defect referred to in the medical certificate of March 11, 1948, concurred in by the medical appeal board on March 26, 1948. It was therefore concluded that she was inadmissible to the United States under Section 3 of the Immigration Act of February 5, 1917 (*infra*, p. 49), and her exclusion was voted by the board (R. 19-21).

On April 21, 1948, one Inga Obum, a friend of petitioner, filed in the District Court for the Southern District of New York, on petitioner's behalf, a petition for a writ of habeas corpus (R. 3-6), which gave rise to the present proceeding. The petition alleged, on information and belief, that petitioner was not mentally defective, that the medical certificate certifying petitioner to be mentally defective was based on a misunderstanding of the report of the ship's doctor and an erroneous impression obtained from interrogating petitioner, and that the medical officers of the Public Health Service ignored the testimony of Dr. Simon to the effect that petitioner was not mentally defective. Miss Obum further alleged that "Since the ship's doctor filed his report, I have personally spoken with him and he has volun-

teered the opinion that [petitioner] is not suffering from any mental disorder" (R. 5).

A writ issued (R. 2), and respondent filed a return (R. 7-9) denying the legal sufficiency of the petition. A copy of the transcript of the proceedings before the board of special inquiry was attached to the return (R. 8, 10-32). On June 10, 1948, the district court (Rifkind, D.J.) entered an order discharging the writ and remanding petitioner to custody, stating that "The only criticism offered is that the Board of Special Inquiry accepted the certificate of the surgeon of the U. S. Public Health Service and rejected that of the alien's own physician. That is not enough to entitle the alien to relief by habeas corpus." (R. 32).

Petitioner's original attorney was thereafter succeeded by another attorney, who, on June 18, 1948, applied to the district court for reargument (R. 34-40) on the following grounds: (1) the board of special inquiry erred in assuming that it had no power to make an independent finding as to petitioner's mental condition (R. 35-37); (2) the medical certificate was not sufficiently explicit as to the nature of petitioner's mental defect (R. 39); (3) the record did not show the qualifications of the examining physicians (R. 39-40); (4) the findings of the original examining physicians, the medical appeal board, and the board of special inquiry were arbitrary, capricious, and unsupported by substantial evidence, in that such findings were

based "solely" on the report of the ship's doctor, who had never been heard under oath or produced for cross-examination, who had been motivated by malice against petitioner in making the report, and had, "prompted I surmise by remorse, subsequently withdrawn his charges" (R. 38-39); (5) the board of special inquiry was improperly constituted under Sections 5(c), 7, and 11 of the Administrative Procedure Act (R. 37-38); and (6) the composition of the board of special inquiry was not the same on April 6, 1948, when it reconvened after adjourning to await the decision of the medical appeal board, as on March 16, 1948, when it originally convened (R. 38).[3]

Reargument was allowed, but the court adhered to its original decision (R. 33, 41-45). The court held that the board of special inquiry acted in accordance with Section 17 of the Immigration Act of 1917 in relying upon the medical certificate (R.

[2] According to the affidavit of petitioner's counsel, filed in support of the motion for reargument, petitioner had informed the affiant that the ship's doctor "behaved * * * in an 'ungentlemanly' way towards her" (R. 39, 35). Apart from this allegation in counsel's affidavit, the only record support for this charge of ungentlemanly misconduct on the part of the ship's doctor is the following cryptic statement by petitioner before the medical appeal board (R. 32): "* * * He [the ship's doctor] is not a gentleman, you know. He put me here and said 'I will give her a chance to go into the U.S. and' he write a report that I was a little mixed up."

[3] A further contention that petitioner did not have the assistance of an interpreter at her examination by the medical officers (R. 40) is no longer pressed. It appears that petitioner speaks English, though not fluently (see R. 29).

42-44); that, since boards of special inquiry are "specially provided for by or designated pursuant to statute" (quoting from Section 7(a) of the Administrative Procedure Act, *infra*, p. 61) they are excepted from the provisions of Section 11 of the latter Act (*infra*, p. 61) pertaining to the use of hearing examiners at hearings provided for by that Act (R. 44); and that the presumption of regularity in the conduct of official business preserved the validity of the medical certificate in the absence of an affirmative showing that the examining doctors were not properly qualified (R. 44-45).

In affirming the order of the district court, the Court of Appeals, one judge dissenting, held that the medical certificate, affirmed by the medical appeal board, was binding on the board of special inquiry under the language and legislative history of Section 17 of the Immigration Act; that the district court correctly held that a board of special inquiry need not be constituted in accordance with the provisions of Section 11 of the Administrative Procedure Act; and that the hearing before the medical appeal board was fair (R. 51-58). The dissenting judge agreed with these propositions of law, but was troubled by "the stark and unadorned form of the medical certificate" (R. 58). He found the certificate "defectively general" and was of the view that there had not been compliance with the requirement of 42 C. F. R. (1947 Supp.) 34.13(h), *infra*, pp. 57-59, that the medical appeal

board's report "shall specifically affirm, modify, or reject the findings and conclusions of prior examining medical officers" (R. 59).

SUMMARY OF ARGUMENT

I

A medical certificate certifying an alien to be afflicted with a disease or defect which renders him mandatorily excludable under the law is binding and conclusive on the board of special inquiry, under Section 17 of the Immigration Act of 1917. Two decisions under the 1907 Act holding that the certificate should not be given conclusive effect by the board of special inquiry were repudiated by Congress, as shown by the legislative history of the 1917 Act.

II

The issuance of a certificate certifying petitioner to be a "Mental Defective, Class A" was a satisfactory compliance with the regulations, which require no more detailed description in this type of case. Petitioner has made no showing of prejudice from any lack of specificity in the certificate as to the nature of her ailment. She never requested more detailed findings, and there is nothing in the record to suggest that more detailed findings would not have been made if requested. At no stage of the administrative proceedings did she raise any issue as to adequacy of the findings. The

issue was first raised in a motion for reargument of the habeas corpus proceeding, after the writ had been granted and dismissed. It clearly was advanced as an after-thought.

The medical appeal board, too, complied with the regulations. Its findings and conclusions were based on its examination of petitioner and the evidence presented to it, as required by the regulations. The board did "affirm, modify, or reject" the findings of the prior examining medical officers by "concurring" in the original certificate.

III

Petitioner's attacks on the composition of the board of special inquiry, based on various provisions of the Administrative Procedure Act, are unavailing.

The contention that the board members were required by Sections 7(a) and 11 of the Act to be hearing examiners is met by the express provision of Section 7(a) that "nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute." Boards of special inquiry are specifically provided for in Section 17 of the Immigration Act, and so fall squarely within this saving exception. This conclusion is likewise supported by the legislative history of the Administrative Procedure Act.

The contention that the composition of the board of special inquiry violated the separation of functions requirements of Section 5(c) of the Act is answered, not only by the excepting language of Section 7(a), *supra*, but also by the clause of Section 5(c) itself exempting "applications for initial licenses" from the provisions of that subsection, and, further, by the introductory clause of Section 5 exempting "proceedings in which decisions rest solely on inspections, tests, or elections" from the requirements of that entire section. An exclusion proceeding in which, as in this case, the sole ground of exclusion is a medical certificate certifying the alien to be afflicted with an ailment which renders her mandatorily excludable, would seem to fall within both of the categories mentioned.

The fact that one of the board members also recorded its proceedings was not an irregularity under the applicable law and regulations. There is nothing in the record to support the contention that this member was unfamiliar with immigration matters, and, in any event, special competence in that field was not necessary in a case of this type, where the board was bound by the medical certificate showing the alien to be afflicted with an ailment which rendered her mandatorily excludable.

Finally, the fact that one of the immigrant inspectors who sat on the board of special inquiry when it first convened was replaced by another

immigrant inspector when it reconvened was not prejudicial, since the latter inspector had familiarized himself with the brief record and purely formal proceedings to date, and since, in any event, the board had no significant function to perform in view of the binding medical findings.

ARGUMENT

I

The Board of Special Inquiry Properly Considered Itself Bound by the Medical Certificate Certifying That Petitioner Was Mentally Defective.

Petitioner contends that it was error on the part of the board of special inquiry to consider itself bound by the medical certificate of mental defectiveness, as concurred in on appeal by the medical appeal board. It is argued that it was the duty of the board of special inquiry to render a *de novo* decision on the question of petitioner's mental defectiveness, or freedom therefrom, on the basis of all the evidence before it, including the medical certificate and any countervailing evidence petitioner had to offer. (Pet. 8-23.) We submit that the courts below[4] correctly construed the applicable portions of Sections 15 and 17 of the Immigration Act of 1917 (*infra*, pp. 50-51) as requiring the board of special inquiry to accept as binding the medical findings.

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[4] With full concurrence on this point by the dissenting judge (see R. 58, 59).

In 1913, Judge Morton of the District Court for the District of Massachusetts held, in *Ex parte Joyce*, 212 Fed. 282, 284-285 (see also *Ex parte Joyce*, 212 Fed. 285, 287), that it was an error of law, depriving the alien of a fair hearing, for the board of special inquiry to deem itself bound by a medical certificate of feeble-mindedness and to refuse to permit the alien an opportunity to adduce countervailing evidence, which the board of special inquiry would then weigh against the medical certificate. This decision was followed, in 1915, by the Court of Appeals for the First Circuit, in *Billings* v. *Sitner*, 228 Fed. 315, 316-317, the court observing that "Such a construction [making the medical certificate binding on the board of special inquiry] would result in giving the inspecting medical officer, instead of the board, the power of final decision" (228 Fed., at 316).

These two decisions were under Section 10 of the Immigration Act of 1907, 34 Stat. 898, 901, which provided that "the decision of the board of special inquiry, * * * based upon the certificate of the examining medical officer, shall be final * * *." Section 17 of the Immigration Act of 1917 (the law now in effect) changed this language to read, "The decision of a board of special inquiry *shall be* based upon the certificate of the examining medical officer and * * * shall be final * * *" [italics added] (*infra*, p. 51). The legislative history of the 1917 Act provides conclusive proof that the pur-

pose of this change in phraseology was to overcome the effect of the *Joyce* and *Billings* decisions. The Senate committee report on the bill which became the 1917 Act, H. R. 10384, states with respect to Section 17 of the bill (S. Rep. 352, 64th Cong., 1st sess., p. 13):

> * * * Section 10 of the act of 1907, making the certificate of the examining medical officer and the decision of a board of special inquiry based thereon conclusive and final in certain cases of disease and mental defect, has been added to this section as a proviso * * *; but the said provision has been slightly changed so as to clarify its meaning and meet recent court decisions tending to modify the principle, upon which provisions of this kind in the immigration law have heretofore been based, that on medical questions the opinions of doctors as against that of laymen should prevail. Of course practical questions should be determined by the immigration officials, but questions of a purely medical nature must be determined by members of the medical profession.

No clearer indication of a congressional intent to overrule judicial decisions construing an Act of Congress could be found than is contained in the above language. As the court below observed (R. 55):

> It seems clear that the "recent court decisions" referred to in the above Senate Report were those of the federal courts of the First

> Circuit. No others existed which have been called to our attention. The report plainly indicates the Senate Committee's view that these decisions did not properly construe Section 10 of the Act of 1907. In such a setting, the words of Section 17 "that the decision of a Board of Special Inquiry shall be based upon the certificate of the examining medical officer" inevitably indicate that the Board must adopt the findings of the certificate on such medical questions as are here involved. What else can be meant by the words: "on medical questions the opinions of doctors as against that of laymen should prevail." A certificate by the medical board if its action conformed to the statute and regulations and its decision was made after a fair hearing was plainly intended to be conclusive.

Despite the congressional rejection of these two pre-1917 decisions, in 1923 the Massachusetts district court (per Morton, D. J., who had decided the *Joyce* case, *supra*) adhered to the discarded doctrine in *Ex parte Liang Buck Chew*, 296 Fed. 182. But, as observed by the court below (R. 55-56), Judge Morton—

> * * * made no mention of the Senate Report which probably had not been called to his attention and rested his decision that the medical certificate was not final largely upon language in Section 16 of the 1917 Act that the certificate was "for the information * * * of the boards of special inquiry." Undoubtedly,

it was for the information of the latter, who under no circumstances could act without having it before them. That the Board of Special Inquiry was not bound to base its decision, so far as it involved medical facts, upon the certificate does not follow from the terms of the Act of 1917 and seems directly contrary to the Senate Report and its expressed purpose. In this connection, we must remember that the language of the Act of 1917 so heavily relied on by Judge Morton is also to be found in Section 17 of the Act of 1907, so that his reasoning fails to answer the clear implications of the Senate Report.

Petitioner contends, however, that this Court's reversal, on the Government's confession of error, 267 U. S. 571, of *United States ex rel. Fink* v. *Tod*, 1 F. 2d 246 (C. A. 2), indicates concurrence by this Court in the view that a board of special inquiry is not bound by a medical certificate certifying an alien to be afflicted with a disease or mental defect which places him in an excluded class. However, while the opinion of the Second Circuit in the *Fink* case contains language supporting our contention in this respect (see 1 F. 2d, at 253), careful analysis of the opinion shows that the main issue there involved was not so much the conclusiveness of the medical certificate on the board of special inquiry as the finality of the decision of the board of special inquiry. The facts in that case were unique in that after the alien was ordered excluded for fee-

blemindedness on the basis of a medical certificate to that effect which had been affirmed by a medical appeal board, she was accorded five additional medical examinations. The first three of these additional examinations resulted in unanimous findings of feeblemindedness; the fourth, in a unanimous finding against feeblemindedness; and the fifth, in a three-to-two vote in favor of feeblemindedness. The case was further complicated by the fact that certain physicians participated in two or more of the total of seven examinations accorded the alien, and that the vote in each instance seemed to have been influenced if not determined by the make-up of the particular board of doctors. The Second Circuit held that the exclusion proceeding should have been terminated when the board of special inquiry first excluded the alien on the basis of the original medical certificate, this decision being declared "final" by the statute, so that the five subsequent medical examinations should all be disregarded (see 1 F. 2d, at 255-257). In this Court, the Government's brief asked affirmance of the Second Circuit's decision (No. 698, O. T. 1924), but the Solicitor General, at the oral argument, for reasons not disclosed by the record and not found in any of the sources available to us, confessed error. In view of the dissimilarity between the issues involved in the *Fink* case and here, and the uncertainty as to the reasons for the confession of error, this Court's acceptance of the confession of

error and reversal of the Second Circuit decision can, therefore, in nowise be construed as an expression of opinion on the issue now under discussion.

Finally, petitioner's reliance on *Gee Shew Hong* v. *Nagle*, 18 F. 2d 248 (C. A. 9), is misplaced. In that case the alien seeking admission was originally found to be free of physical and mental defects. That fact was certified by the medical examiners to the board of special inquiry. Thereafter, for some reason not disclosed by the record, the case was referred back to the medical officers for a further physical examination. The alien was then found to be afflicted with a loathsome or dangerous contagious disease. Upon that second certification he was denied admission by the board of special inquiry. The alien challenged his exclusion on the ground that the first certificate was final and conclusive and that the second examination and certificate were unauthorized. In rejecting that contention, the court did use some language supporting petitioner's argument here, but the language was *dictum*. That was not a case in which the board of special inquiry exercised an independent lay judgment on medical matters, overruling the medical opinion expressed in the medical certificate. Rather, it was a case which was reopened upon the initiative of officials of the Immigration and Naturalization Service, asking a reexamination, but who made no attempt to supersede the medical decision with a lay opinion. This same

procedure is open to the Service at the present time under the Immigration and Naturalization Service regulations (8 C. F. R. (1947 Supp.) 90.10, 90.11, 136.5 and 136.6),[5] which provide specifically for the reopening of a hearing in specified circumstances, either before or after the issuance of a final order.[5a] We do not conceive that a reversal by the medical officers themselves of their original decision indicates in any way that lay opinion can or should be allowed to supersede medical judgment on purely medical matters.[5b]

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[5] See also 42 C. F. R. (1947 Supp.) 34.13(a)(1) and 34.13(i).

[5a] The impracticability of permitting the review of medical questions by lay members of boards of special inquiry is apparent when the following figures are observed. During the fiscal year ending June 30, 1948, 81,323,823 aliens and citizens arrived and were examined at United States ports of entry. Of these 40,305,105 were aliens. The remaining 41,018,718 were citizens. In conducting exclusion proceedings affecting the alien group it was necessary to hold 18,968 board of special inquiry hearings. It is essential that procedures be relied upon which do not cause delay in the handling of such vast numbers of persons. (These figures have been collected for the forthcoming annual report of the Attorney General. For comparable figures for the fiscal year ended June 30, 1947, see the Annual Report of the Attorney General for the fiscal year ended June 30, 1947, p. 619, typewritten copy retained in the Justice library.)

[5b] It is to be noted that 8 C. F. R. (1947 Supp.) 136.1, *infra*, p. 55, provides that "When an alien is certified for a physical defect other than tuberculosis in any form or a loathsome contagious or dangerous contagious disease, the board of special inquiry must decide *on the basis of all the evidence (including the medical certificate)* whether or not such certified defect may affect his ability to earn a living." (italics added).

II

In the Absence of Any Showing of Prejudice or Refusal of the Examining Physicians to Make, on Request, Detailed Findings Respecting Petitioner's Mental Condition, the Medical Certificate Certifying Her to be a "Mental Defective, Class 'A'" Was Not too General to Support the Exclusion Order.

Petitioner urges (Pet. 24-27) that it "was error on the part of the board of special inquiry and of the courts below to use as basis for petitioner's exclusion a medical report so vague, indefinite, and perfunctory, that it did not show the nature of petitioner's purported affliction nor the qualifications

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The regulations thus recognize the power and duty of the board of special inquiry to make an independent determination, on the basis of all the available evidence, of whether or not a physical defect (other than tuberculosis or a loathsome or dangerous contagious disease) may affect the alien's ability to earn a living, the medical certificate being merely evidential on this particular issue. In such cases, Section 3 of the Immigration Act (*infra*, p. 4) makes the alien excludable only if the physical defect is of such a nature as to affect his ability to earn a living. On the other hand, the regulations clearly contemplate that a medical certificate certifying the alien to be afflicted with tuberculosis, a loathsome or dangerous contagious disease, idiocy, imbecility, epilepsy, insanity, feeblemindness, constitutional psychopathic inferiority, mental defectiveness, or chronic alcoholism is to be given conclusive effect by the board of special inquiry since these diseases or defects make the alien automatically excludable. See 8 C. F. R. (1947 Supp.) 136.1 and 136.2, *infra*, p. 55. The regulations are thus in full accord with the interpretation of Section 17 of the Immigration Act made by both courts below, and with the Act's legislative history (*supra*, p. 17), i. e., that medical judgment is to prevail on medical matters and "practical questions" are to be "determined by the immigration officials".

of the examining physicians, that it was based exclusively upon the insufficient evidence of the hearsay report of the Swedish ship's doctor" (Pet. 24).

The last two aspects of this contention do not, we think, require extended discussion.

(a) In respect of the absence of a statement on the face of the medical certificate showing the qualifications of the examining medical officers, we find no evidence presented by petitioner that they were not qualified in accordance with Section 16 of the statute (*infra*, pp. 50-51),[9] and there is no requirement in the statute or the regulations governing the examination that such information be included in the certificate. Petitioner, though represented by counsel at the hearing before the board of special inquiry after her appeal to the medical appeal board (see pp. 6-8, *supra*), did not raise any such issue. In view of the total lack of record support for the suggestion that the examining

[9] Petitioner states that she "expressly alleged on information and belief that the medical examiners were not qualified under the said statute" (Pet. 26). The reference is to an averment, by petitioner's second attorney in support of the motion for reargument of the habeas corpus proceeding in the district court, that "In view of the absence of such showing of the qualifications [on the face of the medical certificate] and because I have been informed that some of the examining physicians were quite young, it is urged, on information and belief, that the medical examiners were not qualified to act under Section 152, Title 8, U. S. C." (R. 40). We fail, however, to see how the youth of the physicians (assuming the fact) could be relevant, and all that remains of the allegation is the bald legal conclusion of lack of qualification.

medical officers were unqualified, we submit that the district court was clearly correct in observing that "The presumption of regularity in the conduct of official business * * * is sufficient to preserve the validity of the certificate, at least, in the absence of an affirmative showing of non-compliance with the statute" (R. 44-45).

(b) As to the allegation that the medical certificate "was based exclusively upon * * * the hearsay report of the Swedish ship's doctor" (Pet. 24), the record simply contradicts the assertion. The certificate states that "the above-described person *has this day been examined* and is found to be afflicted * * *" [italics added] (R. 22). Indeed, as we have pointed out (*supra*, p. 3), while we may assume that the examining physicians had access to the report of the ship's doctor, the record does not clearly indicate even that much. It is true that the medical appeal board had the ship's doctor's report before it (R. 29), but the board certainly did not base its decision affirming the medical certificate on that alone. The record shows that the physicians on the medical appeal board heard the testimony of petitioner's medical witness, Dr. Simon (R. 27-29), extensively interrogated petitioner (R. 29-32), and then issued their report stating that they concurred in the certificate "after taking into consideration the certificate * * * and the testimony given by Dr. Carlton Simon" (R. 26). How much weight the medical

officers may have given to the report of the ship's doctor it is impossible to say, but the court below was clearly correct, we submit, in holding that it was for the medical officers to determine what weight should be attached to it (R. 57-58). It is to be noted in this connection, as the court below observed (R. 58), that "the report of the Swedish doctor had confirmation in the alien's own admission [to the medical appeal board] that she told him that she had hallucinations," though she at that time denied the truth of what she had admitted (see p. 6, *supra*).

(c) Petitioner's criticism that the medical report did not show the specific nature of her affliction we believe to be equally groundless. This matter was not discussed in the majority opinion below, though the contention must have been considered and rejected, since the dissent is based solely upon "the stark and unadorned form of [the] medical certificate" (R. 58) and the supposed failure of the medical appeal board to follow the applicable regulations (R. 59), which latter ground we shall consider under (d), *infra*, pp. 32-34.

In the first place, there is no indication whatever that petitioner was prejudiced by any lack of information as to the nature of the mental defect found by the medical officers or that she failed to understand what the defect was. If she felt that the lack of specificity in the certificate as to the

nature of her ailment might prejudice her attempt to have it reversed or modified on her appeal to the medical appeal board, she certainly could have requested the medical officers to be more specific in their findings. There is nothing in the record which indicates that any such request was ever made or refused. Neither did she complain to the medical appeal board about the lack of specificity in the certificate. Nor did her medical witness before the medical appeal board, Dr. Simon, make any such complaint. Further, though she was represented by counsel in her second appearance before the board of special inquiry, after the medical appeal board had filed its report, she still did not object to the form of the medical certificate. Her counsel asked leave to present additional countervailing evidence, but made no attack on the form of the certificate or of the medical appeal board's report concurring therein. Indeed, the form of the certificate was not criticized even in the petition for habeas corpus. The point was first made in the affidavit of petitioner's new counsel in support of her application for reargument in the habeas corpus proceeding (see p. 9, *supra*). It plainly is an after-thought. Even now petitioner does not claim prejudice, but bases her complaint upon mere formal insufficiency by way of technical non-compliance with the regulations.

We submit, however, that the regulations were fully and literally complied with. The regulations

governing the medical examination of aliens are found in 42 C. F. R. (1947 Supp.), Part 34 (copied in pertinent part in the Appendix, *infra*, at pp. 55-59). Section 34.2(c), *infra*, p. 56, defines the medical certificate as—

> A document issued by an examining medical officer to the Immigration Service, signed by him and certifying his findings with respect to an alien's physical and mental condition.

And in Section 34.7, *infra*, pp. 56-57, provision is made for the issuance of a Class A certificate[7] in respect of any alien who is found to be afflicted with any of the following physical and mental diseases and defects:

> (a) Tuberculosis in any form;
>
> (b) A loathsome or dangerous contagious disease;
>
> (c) Idiocy, imbecility, feeblemindedness, epilepsy, insanity, chronic alcoholism, or constitutional psychopathic inferiority;
>
> (d) A mental defect not enumerated in paragraph (c) of this section; *Provided, however,* That a Class A certificate * * * shall in no case be issued with respect to an alien hav-

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[7] A Class A certificate is issued with respect to diseases or defects which make an alien automatically excludable under the statute (*infra*, pp. 49, 56-57), a Class B certificate with respect to physical defects which make the alien excludable if they are of such a nature that they may affect his ability to earn a living (*infra*, pp. 29-31, 49, 56-57), and a Class C certificate with respect to other diseases or defects not covered by Class A or B (*infra*, p. 57).

> ing only mental shortcomings due to ignorance, or suffering only from a mental condition attributable to remediable physical causes, or from a psychosis of a temporary nature caused by a toxin, drug, or disease.

The medical certificate issued in this case, reporting that petitioner had been examined and found to be a mental defective, and was therefore in Class A, constituted a satisfactory compliance with these provisions. That it was unnecessary under the regulations, at least in the absence of any request to that effect by the alien, for the medical officers to state more explicitly the nature of the mental deficiency found to exist, is emphasized by contrasting with the provisions of Section 34.7, *supra*, those of Section 34.8. The latter section (*infra*, p. 57), establishing the Class B certificate, provides:

> A class B certificate * * * shall be issued with respect to an alien who has a physical defect which is of such a nature that it may affect his ability to earn a living. The certificate * * * shall state the nature and extent of the physical defect, whether it is chronic or permanent, and the extent to which it is likely to render the alien incapable of pursuing a vocation or profession for which he has particular training or experience, or, if he has no such vocation or profession, incapable of performing ordinary physical or manual work.

There is good and sufficient reason for the specificity required with respect to a Class B certificate which further emphasizes the function concerning "practical questions" exercised by boards of special inquiry. (See footnote 5b, *supra.*) The holder of a Class B certificate has a chance to be admitted to the United States, provided it can be shown that the disability, which is the basis of the certificate, will not interfere with ability to earn a living, and provided a bond can be furnished in accordance with the terms of section 21 of the Immigration Act of 1917 (*infra,* p. 52). It follows, therefore, that information relative to the "nature and extent" of the physical defect is necessary for the deliberations of the boards of special inquiry. No such specificity is demanded where the disability found to exist is one of those for which a Class A certificate is issued, inasmuch as a Class A determination calls for mandatory exclusion.

The differentiation between Class A and Class B certificates in respect of the requirement of specificity in the findings is further emphasized by the provision of 8 C. F. R. (1947 Supp.) 130.4, *infra,* p. 54, that—

> Where the certificate of the medical examiner fails to describe particularly the nature, character, and extent of the physical defect which it is certified may affect the ability of the alien to earn a living [i.e., a Class B defect], boards of special inquiry shall call such

> examiner as a witness and interrogate him fully as to the particular nature, character, and extent of the affliction certified. Such testimony shall be made a part of the record.

Significantly, the regulations neither require nor authorize the board of special inquiry to call the medical examiner or examiners for the purpose of ascertaining in more detail the nature of the disease or defect for which a Class A certificate has been issued. The reason for this would seem to be apparent. Where a Class A certificate has been issued, it is binding on the board of special inquiry. See Point I, *supra* pp. 15-23. The board must, in that event, find the alien mandatorily excludable, so that further inquiry into the nature of the disease or defect becomes unnecessary.

Moreover, the terms "mental defect" and "mental defective", far from being "so vague, indefinite, and perfunctory" that they cannot "show the nature of petitioner's purported affliction" (Pet. 24), have an accepted meaning and connotation for the medical profession. See 10 Enc. of Soc. Sciences, p. 312, article on "Mental defectives" by Dr. David M. Levy; cf. Webster's New International Dictionary (2nd ed.), pp. 686 ("defective") and 1536 ("mental deficiency"). And, at the same time, it must be recognized that the present state of psychiatry is such that there is little common acceptance of very precise or specific terms of diagnosis—comparable to the ter-

minology generally employed to denote physical diseases and ailments.[8]

(d) The dissenting judge, in addition to criticizing the original medical certificate as being "defectively general," also was of the view that the medical appeal board failed to follow the applicable regulations governing appeals to it from the initial certification (R. 59), and his views in this respect are now adopted by petitioner (Pet. 24). The regulations governing such appeals are contained in 42 C. F. R. (1947 Supp.) 34.13, *infra*, pp. 57-59. The dissenting judge thought, erroneously, we believe, that the report made by the medical appeal board did not comply with subsections (g) and (h) of Section 34.13, which provide:

> (g) The findings and conclusions of the board shall be based on its medical examination of the alien and on the evidence presented to it and made a part of the record of its proceedings.
>
> (h) The board shall report its findings and conclusions to the Immigration Service, and shall also give prompt notice thereof to the

[8] These regulations authorizing the issuance of the various types of certificates are in full accord with the statute, which specifically grants power to issue administrative and medical regulations governing the medical examination of incoming aliens (Immigration Act, secs. 11, 16, *infra*, pp. 49-50). Nothing in the pertinent sections of the Immigration Act (secs. 3, 11, 16, 17) requires or even suggests that a medical certificate of the type involved here should be more specific than petitioner's.

alien if the re-examination has been held upon his appeal. The board's report to the Immigration Service shall specifically affirm, modify, or reject the findings and conclusions of prior examining medical officers.

In the reexamination of petitioner by the medical appeal board (R. 26-32), she was represented by a medical witness of her choosing, and both the witness and petitioner were carefully examined by the members of the board. The entire proceeding was included verbatim in the report of the board, as required by subsection (g), and the findings and conclusions were specifically stated to have been based upon the previous certificate, the appeal proceedings, and the testimony of petitioner's witness.[9] As required by subsection (h), the findings and conclusions were reported to the Immigration Service, and petitioner was likewise informed of the result at the hearing before the board of special inquiry, if not before. The board's report did "specifically affirm, modify, or reject the findings and conclusions of prior examining medical officers" (subsection (h)), as follows (R. 26):

[9] Petitioner does not question the existence of evidence supporting the certificate and the medical appeal board's finding of concurrence, and she could not well do so (R. 13, 23-32). If such an attack were made by an alien in habeas corpus proceedings, the board's findings and conclusions, as required by the regulations, would be entirely sufficient as a basis for judicial scrutiny, since they incorporate a verbatim report of the board's proceedings.

> Pursuant to the request of the District Director of Immigration and the order of the Medical Officer in Charge, the following Board of Medical Officers of the U. S. Public Health Service, has considered the appeal regarding subject—named May Gunborg Johnson and after taking into consideration the certificate of Mar. 11, 1948 and the testimony given by Dr. Carlton Simon, reports that it concurs with the above dated certificate.

Since, as we have already shown (*supra*, pp. 26-32), the medical certificate need "find" nothing more than the fact that an alien is afflicted with a mental defect, we submit that the above statement of concurrence, based upon a verbatim reported account of unobjectionable proceedings, constituted full compliance with the regulations and was sufficient for all purposes.

III

The Board of Special Inquiry Was Properly Constituted

Petitioner contends (Pet. 28-36) that the board of special inquiry was improperly constituted in the following respects: (a) the members of the board were not examiners appointed pursuant to Section 11 of the Administrative Procedure Act of 1946, *infra*, p. 61;[10] (b) the composition of the

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[10] In our brief in opposition to certiorari, p. 23, we called the Court's attention to the fact that petitioner, in her brief in the Court of Appeals, conceded that boards of special inquiry are exempt from the requirements of Section 11. We have since learned that petitioner withdrew this concession at the oral argument below.

board violated the separation of functions requirements of Section 5(c) of the Act, *infra*, p. 60; (c) one of the members of the board was also the secretary who recorded its proceedings; and (d) one of the immigrant inspectors who sat as a member of the board on March 16, 1948, was replaced by another inspector when the hearing resumed on April 6, 1948. We submit that the board was properly constituted, but that in any event, if we are correct in our contention (Point I, *supra*, pp. 15-23) that the board was bound by the medical certificate certifying petitioner to be a mental defective and hence mandatorily excludable, she could have suffered no prejudice from any defect in the make-up of the board.

(a) It is the Government's contention that proceedings before boards of special inquiry are not governed by the Administrative Procedure Act. Section 7(a) of that Act, *infra*, pp. 60-61, prescribing who shall preside over hearings governed by the Act, provides as follows:

> PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; *but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute.* (Italics supplied)

Boards of special inquiry, we submit, fall squarely within the saving exception for "boards * * * specially provided for by or designated pursuant to statute." This is so because Section 17 of the Immigration Act, *infra*, p. 51, establishing boards of special inquiry, expressly and precisely provides that—

> Boards of special inquiry shall be appointed by either the district director of immigration and naturalization designated by the Commissioner or by the inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards. * * * Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. * * *

Here we have not merely an authorization to appoint to boards of special inquiry such immigration officials as may be designated by the Commissioner, but a statutory command that the boards be so constituted.[11] Clearly, therefore, boards of

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[11] See 8 C. F. R. (1947 Supp.) 60.29 and 130.1, *infra*, pp. 52-54, for the administrative regulations, issued pursuant to Section 17 of the Immigration Act, relating to the appointment and qualifications of members of boards of special inquiry.

special inquiry are "boards * * * specially provided for by or designated pursuant to statute," within the meaning of Section 7(a) of the Administrative Procedure Act, and consequently need not be composed of examiners appointed in accordance with Section 11.[12]

This construction of Section 7(a) accords with the general policy of the Act, the object of which was to regulate procedures developed by the administrative agencies in the exercise of their discretionary authority. Its sponsors affirmatively disclaimed any intention to disturb procedures theretofore specifically prescribed by Congress itself. Senator McCarran, Chairman of the Senate Judiciary Committee in charge of the bill (S. 7) ultimately enacted as the Administrative Procedure Act, so stated on the floor of the Senate in the following colloquy concerning the application of the Act to procedures before the Interstate Commerce Commission (92 Cong. Rec. 2152; Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 307):

> MR. REED. I confess a lack of understanding of the bill. I have had considerable experience with some of the Government agencies, particularly the Interstate Commerce Commission. Over the years the Congress has

[12] This has been the consistent view of the Immigration and Naturalization Service. See statement of former Commissioner Carusi in *The Federal Administrative Procedure Act and the Administrative Agencies* (1947), p. 292. See also Note (1949) 49 Col. L. R. 73, 78-80.

laid down rules of procedure instructing the Interstate Commerce Commission as to how to act in certain cases in the matter of rate making, valuations, and orders. All that is prescribed by statute. Is there anything in this bill that would interfere with that procedure?

MR. MCCARRAN. There is nothing in this bill which would interfere with such procedure.

* * *

MR. REED. And it would not change its method and the rule of doing business when the method and rule is founded on statutory authority?

MR. MCCARRAN. That is correct.

MR. REED. I thank the Senator.

MR. MCCARRAN. Let me say to the Senator from Kansas that that has been one of the great problems we have had to work out in the long months of study which we have devoted to the bill. We did not wish to disrupt or change anything that was statutory; and yet we wanted to establish something which would prescribe and define the avenue by which the individual citizen could gain access to a public agency which would touch his private life, and we wished to find for him a way through the procedure.

Senator McCarran, in commenting on the intended effect of the provisions for judicial review of administrative orders (Section 10, 5 U. S. C. 1009), again emphasized that the bill was in nowise

intended to repeal any Act of Congress. He stated (92 Cong. Rec. 2154; Sen. Doc. No. 248, p. 311):

> MR. MCCARRAN: * * * But in answer to the first part of the Senator's question—namely, where a review is precluded by law—we do not interfere with the statute, anywhere in this bill. Substantive law, law enacted by statute by the Congress of the United States, granting a review or denying a review is not interfered with by this bill. We were not setting ourselves up to abrogate acts of Congress.

The legislative history of the Administrative Procedure Act thus makes it clear that the purpose of Sections 7(a) and 11 was to establish a system of hearing examiners for the conduct of agency hearings required by statute (Section 5, *infra*, pp. 59-60); where the statute itself is silent in respect of what officers shall conduct the hearings or how they shall be selected.[13] Any other construction of Section 7(a) would render meaningless the excepting language, "* * * but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or in part

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[13] For examples of such statutes, see 7 U. S. C. 193; 15 U. S. C. 45; 21 U. S. C. 344(b), 355(d) and (e); 39 U. S. C. 232.

by or before boards or other officers specially provided for by or designated pursuant to statute."[14]

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[14] *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457 (C. A. 3), vacated on other grounds, 168 F. 2d 1014, cited by petitioner (Pet. 28), relates to the question of the applicability of the judicial review provisions of the Administrative Procedure Act (Section 10, 5 U. S. C. 1009) to deportation orders, the issue being whether, in view of 8 U. S. C. 155(a) (declaring the Attorney General's decision to deport an alien "final"), deportation orders are subject to Section 10, the opening clause of which excepts from the judicial review provisions thereof any agency action in respect of which judicial review is precluded by statute. The *Trinler* case held that, notwithstanding 8 U. S. C. 155(a), deportation orders are subject to the judicial review provisions of Section 10. *United States ex rel. Lindenau* v. *Watkins*, 73 F. Supp. 216 (S. D. N. Y.), reversed on other grounds *sub nom. United States ex rel. Paetau* v. *Watkins*, 164 F. 2d 457 (C. A. 2), also cited by petitioner (Pet. 28), seems to have assumed, without discussion, the applicability of Section 10 to deportation orders. These cases have no relevance here, however, since the instant case involves no question as to the applicability of Section 10 to an exclusion order.

Eisler v. *Clark*, 77 F. Supp. 610 (see also Appendix II, Pet. 55-58), decided by Judge Goldsborough of the District Court for the District of Columbia, appeal dismissed on October 4, 1948, by stipulation of parties, held that deportation proceedings are required by the Administrative Procedure Act to be conducted by hearing examiners. This decision has, however, in effect been overruled by *Wong Yang Sung* v. *Clark* (C. A. D. C.), decided April 4, 1949, which affirmed Judge Holtzoff's contrary decision in *Wong Yang Sung* v. *Clark*, 80 F. Supp. 235. In accord with the *Wong Yang Sung* decision is *Azzollini* v. *Watkins* (C. A. 2), decided March 10, 1949; see also, *Ex parte Wong So Wan*, 82 F. Supp. 60 (N. D. Cal.). It is not necessary for the purposes of this case, however, to determine whether the *Wong Yang Sung*, *Azzollini* and *Wong So Wan* cases were correctly decided. Those cases have no necessary bearing because the question as to the applicability of the

(b) Petitioner's further contention—that the composition of the board of special inquiry violated the separation of functions requirements of Section 5(c) of the Administrative Procedure Act, *infra*, p. 60, in that the members of the board were "responsible to and subject to the supervision and direction of their superiors in the Service, their officers, employees and agents who are engaged in the performance of the investigating and prosecuting functions of the Service" (Pet. 36)—is answered, we think, by the same considerations we have mentioned under (a), *supra*, pp. 35-40. For, since "nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or in part by or before boards or other officers specially provided for by or des-

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examiner provisions of the Administrative Procedure Act to *deportation* proceedings raises a different problem from that of their applicability to *exclusion* proceedings. *Exclusion* proceedings are had before boards of special inquiry, which, as we have stated (*supra* pp. 35-37), are specifically provided for by Section 17 of the Immigration Act, and for that reason fall squarely within the language of Section 7(a) of the Administrative Procedure Act excepting "boards * * * specially provided for by or designated pursuant to statute" from the examiner provisions. With respect to *deportation* proceedings the issues are different, for reliance is had on Section 16 of the Immigration Act, 8 U. S. C. 152, which does not refer to boards of special inquiry and pertains to "immigrant inspectors" in somewhat more general terms than Section 17 uses for boards of special inquiry. See *Wong Yang Sung* v. *Clark*, *supra* and *Azzollini* v. *Watkins*, *supra*. Furthermore, Congress has not provided for the granting of hearings in deportation cases, such hearings being accorded as a matter of constitutional due process.

ignated pursuant to statute" (Section 7(a)), it follows that the separation of functions provisions of Section 5(c) are no more applicable to proceedings before boards of special inquiry than are the examiner provisions of Sections 7(a) and 11.

There is, however, an additional reason why Section 5(c) has no application to exclusion proceedings generally, *viz.*, the provision in the last sentence of Section 5(c) that that subsection "shall not apply in determining applications for initial licenses." The term "license" is defined in Section 2(e), *infra*, p. 59, as including "the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." Seeking to enter the United States would seem to involve an application for a "license" within the broad and functional definition of Section 2(e). The phrase "determining applications for initial licenses" in Section 5(c) refers to the grant or denial of an application for a license, as opposed to such matters as the revocation or suspension of licenses.[15] Accordingly, it is believed that the pro-

[15] The rationale of this exception for proceedings involving "determining applications for initial licenses" is discussed in the *Attorney General's Manual on the Administrative Procedure Act* (1947), pp. 50-53. It is there pointed out that "The Administrative Procedure Act is based upon a broad and logical dichotomy between rule making and adjudication, i.e., between the legislative and judicial functions. * * * The legislative history of section 5(c) reveals that 'determining applications for initial licenses' was exempted from the requirements of the subsection on the ground that such proceedings are similar to rule making" (p. 50).

ceedings of boards of special inquiry in determining whether aliens are entitled to be admitted into the United States involve the determination of "applications for initial licenses," and are therefore not subject to the requirements of Section 5(c).[16]

The foregoing two arguments against the applicability of the separation of functions provisions of Section 5(c) to proceedings before boards of special inquiry apply generally to all proceedings before such boards. There is, however, a third reason why Section 5(c) should not be deemed to apply to the proceedings before the board in the particular type of case here involved. The introductory clause of Section 5 excepts, not merely from the provisions of subsection (c), but from Section 5 in its entirety, "(3) proceedings in which decisions rest solely on inspections, tests, or elections" (*infra*, pp. 59-60).[17] Where, as in this case, the sole basis for exclusion is medical, the determination of the alien's mental condition is made

[16] This is the contemporaneous and consistent interpretation of Section 5(c) by the Immigration and Naturalization Service. See statement of former Commissioner Carusi in *The Federal Administrative Procedure Act and The Administrative Agencies* (1947), p. 292.

[17] For the genesis and rationale of this exception, see the *Final Report of the Attorney General's Committee on Administrative Procedure* (1941), p. 37; for the legislative history and for other examples, see *The Attorney General's Manual on the Administrative Procedure Act* (1947), pp. 44-45.

by the Public Health doctors (with a right of appeal to a medical appeal board in the event the determination is adverse to the alien). Since, as we have argued (point I, *supra*, pp. 15-23), the finding of the medical officers (or the medical appeal board where there has been an appeal) is binding and conclusive on the board of special inquiry, it is evident that the hearing before the board of special inquiry is in reality a mere formality where, as here, there are no non-medical grounds for exclusion. Thus, where, as in this case, an alien is excluded solely upon medical grounds, the decision must be deemed to rest solely on an "inspection" or "test" within the meaning of the introductory clause of Section 5, with the result that the proceedings in such exclusion cases are exempt from the provisions of that section in its entirety.[18]

(c) Petitioner's objection to the fact that Mr. Fairbanks (who acted as secretary to the board of special inquiry to record its proceedings) sat as a member of the board, is without merit. Section 17 of the Immigration Act, *infra*, p. 51, provides that "Each board [of special inquiry] shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization,

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[18] This is also a separate and independent ground for rejecting petitioner's other contentions under Section 7, since that provision of the Administrative Procedure Act is applicable only to proceedings governed by Section 5 (*infra* p. 60). See also fn. 19, *infra* pp. 46-47.

with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards." And 8 C. F. R. (1947 Supp.) 130.1, *infra*, pp. 53-54, provides that "One of the members [of the board of special inquiry] may act as secretary for the purpose of keeping the complete permanent record of the proceedings before the board and of all such testimony as may be produced before it." The appointment of Mr. Fairbanks to the board and his designation as secretary to record its proceedings were therefore entirely regular. *United States ex rel. Minuto* v. *Reimer*, 83 F. 2d 166, 168 (C. A. 2).

Petitioner's contention that Mr. Fairbanks did not possess such competence as a board member as to bring him within the spirit of the exception of Section 7(*a*) for special statutory hearing officers is likewise without merit. The contention is based on the assumption that Mr. Fairbanks was a mere "stenographer, temporarily employed and uninstructed in immigration matters" (Pet. 33), an assumption that finds no support in the record. For aught that appears, Mr. Fairbanks may have had extensive experience as a member of boards of special inquiry and consequently may have been just as qualified to act in that capacity as an immigrant inspector. Obviously, the fact that he was a competent stenographer and reporter does

not necessarily indicate that he was "uninstructed in immigration matters."[19]

(d) Petitioner's final contention is that the proceedings before the board of special inquiry contravened that clause of Section 5(c), *infra*, p. 60, providing that "The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency." The argument is based on the fact that Inspector Danielson, who was one of the three members of the board of special inquiry when it first convened on March 16, 1948, was replaced by Inspector Mintzer when the board reconvened on April 6, 1948 (*supra*, pp. 4, 6-7). However, the non-applicability of any of the provisions of Section 5(c) to this

[19] In any event, if we are correct in our view (point I, *supra*, pp. 15-23) that the finding of the medical officers was binding upon the board of special inquiry, then the latter, in this case, had no function to perform that would require special competence in immigration matters. The sole ground for petitioner's exclusion having been medical, petitioner could in no way have been prejudiced by the composition of the board of special inquiry.

Furthermore, as we argued at pp. 43-44, *supra*, where the exclusion of an alien is based solely upon medical grounds, the decision rests solely on "inspections" or "tests" within the meaning of the introductory clause of Section 5, excepting from all of the provisions of Sections 5, 7, and 8, "proceedings in which decisions rest solely on inspections, tests, or elections." In such a case, therefore, the composition of the board of special inquiry is in no way governed by Section 7.

proceeding has previously been urged on several grounds *supra*, pp. 41-44. It remains only to point out that the substitution of Inspector Mintzer for Inspector Danielson arose out of the continuance of the board hearing from March 16 to April 6 for the sole purpose of enabling petitioner to appeal to the medical appeal board (R. 14). We believe that petitioner is not in a position to complain of a substitution resulting from a continuance of the board hearing for the purpose of enabling her to pursue her only effective remedy on the medical issue.

In any event, petitioner was plainly not prejudiced by the substitution of inspectors. As we pointed out in the Statement, *supra*, pp. 6-7, when the board reconvened on April 6, the minutes of the previous meeting were incorporated into the record, and Inspector Mintzer indicated that he had familiarized himself with the brief and scarcely significant proceedings which had occurred at the first meeting. "The change in the personnel of the Board [of Special Inquiry] furnishes no proof that there was not a fair hearing. The minutes of the first hearing were made part of the record at the second, so everything was before the board that took final action. It is well settled that a maintenance of continuity of personnel is not necessary so long as all the essentials of a fair hearing are observed by the board exercising ultimate judgment." *United States ex rel. Minuto* v. *Reimer*, 83 F. 2d 166, 167-168 (C. A. 2), and cases cited.

Finally, as noted above (footnote 19, *supra*, p. 46), the substitution of inspectors could not have prejudiced petitioner for the additional reason that the finding of the medical officers on the medical issue was conclusive upon the board of special inquiry.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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APRIL 1949.

APPENDIX

1. The Immigration Act of February 5, 1917, c. 29, 39 Stat. 874, *et seq.*, as amended, provides in pertinent part:

* * * * *

Sec. 3 [8 U. S. C. 136]. The following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons; persons who have had one or more attacks of insanity at any time previously; persons of constitutional psychopathic inferiority; persons with chronic alcoholism; * * * persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such physical defect being of a nature which may affect the ability of such alien to earn a living; * * *.

* * * * *

Sec. 11 [8 U. S. C. 147]. For the purpose of determining whether aliens arriving at ports of the United States belong to any of the classes excluded by this Act, * * * the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, may direct that such aliens shall be detained * * * a sufficient time to enable the immigration officers and medical officers stationed at such ports to subject aliens to an observation and examination sufficient to determine whether or not they belong to the said excluded classes * * *. * * * the Commissioner

of Immigration and Naturalization may, with the approval of the Attorney General, issue such regulations, not inconsistent with law, as may be deemed necessary to effect the purposes of this section * * *.

* * * * * *

Sec. 16 [8 U. S. C. 152]. The physical and mental examination of all arriving aliens shall be made by medical officers of the United States Public Health Service who shall conduct all medical examinations and shall certify, for the information of the immigration officers and the boards of special inquiry hereinafter provided for, any and all physical and mental defects or diseases observed by said medical officers in any such alien; * * *. All aliens arriving at ports of the United States shall be examined by not less than two such medical officers at the discretion of the Attorney General, and under such administrative regulations as he may prescribe and under medical regulations prepared by the Surgeon General of the United States Public Health Service. Medical officers of the United States Public Health Service who have had especial training in the diagnosis of insanity and mental defects shall be detailed for duty or employed at all ports of entry designated by the Attorney General, and such medical officers shall be provided with suitable facilities for the detention and examination of all arriving aliens in whom insanity or mental defect is suspected, and the services of interpreters shall be provided for such examination. Any alien certified for insanity or mental defect

may appeal to the board of medical officers of the United States Public Health Service, which shall be convened by the Surgeon General of the United States Public Health Service, and said alien may introduce before such board one expert medical witness at his own cost and expense. * * *

Sec. 17 [8 U. S. C. 153]. Boards of special inquiry shall be appointed by either the district director of immigration and naturalization designated by the Commissioner or by the inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards. * * * Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. * * * The decision of a board of special inquiry shall be based upon the certificate of the examining medical officer and, except as provided in section twenty-one hereof [infra, p. 52], shall be final as to the rejection of aliens affected with * * * any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under section three of this Act.

* * * * *

Sec. 21 [8 U. S. C. 158]. Any alien liable to be excluded because likely to become a public charge or because of physical disability other than tuberculosis in any form or a loathsome or dangerous contagious disease may, if otherwise admissible, nevertheless be admitted in the discretion of the Attorney General upon the giving of a suitable and proper bond or undertaking, approved by said Attorney General, in such amount and containing such conditions as he may prescribe, to the United States and to all States, Territories, counties, towns, municipalities, and districts thereof, holding the United States and all States, Territories, counties, towns, municipalities, and districts thereof harmless against such alien becoming a public charge. In lieu of such bond, such alien may deposit in cash with the Attorney General such amount as the Attorney General may require, * * *.

* * * * * *

2. Title 8, Code of Federal Regulations (1947 Supp.), provides in pertinent part:

* * * * *

PART 60—FIELD SERVICE DISTRICTS AND OFFICERS

* * * * *

§ 60.29 *Persons qualified as members of boards of special inquiry; oath.* In accordance with the provisions of section 17 of the Immigration Act of 1917 (39 Stat. 887; 8 U. S. C. 153), the following persons are hereby designated as qualified and determined to be eligible to serve on boards of special inquiry:

(a) Immigration inspectors, including persons designated immigrant inspectors by § 60.27;

(b) All other employees of the Immigration and Naturalization Service whose supervisory officers assign to them the duty of acting as secretaries of such boards for the purpose of keeping the complete permanent record of the proceedings and of all such testimony as may be produced; and

(c) Persons, other than employees of the Immigration and Naturalization Service but preferably Government employees, who are selected by an Immigration and Naturalization Service official in charge of a port where no permanent board of special inquiry is maintained and to which it is impracticable to detail a board from some other station. Such persons shall, before serving on a board of special inquiry, subscribe to an oath of office on Form I-266 before an immigrant inspector.

* * * * *

PART 130—BOARDS OF SPECIAL INQUIRY

§ 130.1 *Organization.* Each of the three members of a board of special inquiry prescribed by section 17 of the Immigration Act of 1917 (39 Stat. 887; 8 U. S. C. 153) shall be a person qualified for such membership as provided by §60.29 of this chapter. The officer in charge shall designate one of the members as chairman. One of the members may act as secretary for the purpose of keeping the com-

plete permanent record of the proceedings before the board and of all such testimony as may be produced before it.

* * * * *

§ 130.4 *Medical examiner as witness.* Where the certificate of the medical examiner fails to describe particularly the nature, character, and extent of the physical defect which it is certified may affect the ability of the alien to earn a living, boards of special inquiry shall call such examiner as a witness and interrogate him fully as to the particular nature, character, and extent of the affliction certified. Such testimony shall be made a part of the record.

* * * * *

§ 130.8. *Alien certified for mental condition; right of medical appeal.* An alien certified for insanity or mental defect shall be advised of his right to appeal to a board of medical officers of the United States Public Health Service, and that he may introduce before such board one expert medical witness at his own cost and expense. The exact language employed in so informing the alien of his rights, together with a full and accurate transcript of his reply, shall be inserted in the record and made a part thereof. * * *

* * * * *

PART 136—APPEALS FROM DECISIONS BY BOARD OF SPECIAL INQUIRY

* * * * *

§ 136.1 *Who may appeal.* * * * When an alien is certified for a physical defect other than tuberculosis in any form or a loathsome contagious or dangerous contagious disease, the board of special inquiry must decide on the basis of all the evidence (including the medical certificate) whether or not such certified defect may affect his ability to earn a living. An alien rejected on said ground is entitled to appeal.

§ 136.2 *When no appeal lies.* No appeal lies where the decision of a board of special inquiry, based upon the certificate of the examining medical officer, as required by section 17 of the Immigration Act of 1917 (39 Stat. 887; 8 U. S. C. 153), rejects an alien because (*a*) he is afflicted with tuberculosis in any form or a loathsome contagious or dangerous contagious disease, or (b) he is an idiot or an imbecile or an epileptic or is insane or feebleminded, or (*c*) he is afflicted with constitutional psychopathic inferiority or has any mental defect or is a chronic alcoholic.

* * * * *

3. Title 42, Code of Federal Regulations (1947 Supp.), provides in pertinent part:

* * * * *

PART 34—MEDICAL EXAMINATION OF ALIENS

§ 34.1 *Applicability.* The provisions of this part shall apply to (a) the medical examination and re-examination of aliens presented

therefor to the Public Health Service upon the arrival of such aliens at a port of entry * * *

* * * * *

§ 34.2 *Definitions.* As used in this part, terms shall have the following meanings:

* * * * *

(c) *Medical certificate.* A document issued by an examining medical officer to the Immigration Service, signed by him and certifying his findings with respect to an alien's physical and mental condition.

* * * * *

§ 34.6 *Aliens afflicted with disease or defect.* If an alien is found to have one or more physical or mental diseases or defects, medical officers shall report their findings to the Immigration Service, by medical certificate * * *

§ 34.7 *Certificates and notifications; Class A.* A Class A certificate * * * shall be issued with respect to any alien who is found to be afflicted with any of the following diseases or defects:

(a) Tuberculosis in any form;

(b) A loathsome or dangerous contagious disease;

(c) Idiocy, imbecility, feeblemindedness, epilepsy, insanity, chronic alcoholism, or constitutional psychopathic inferiority;

(d) A mental defect not enumerated in paragraph (c) of this section; *Provided, how-*

ever, That a Class A certificate * * * shall in no case be issued with respect to an alien having only mental shortcomings due to ignorance, or suffering only from a mental condition attributable to remediable physical causes, or from a psychosis of a temporary nature caused by a toxin, drug, or disease.

§ 34.8 *Certificates and notifications; Class B.* A Class B certificate * * * shall be issued with respect to an alien who has a physical defect which is of such a nature that it may affect his ability to earn a living. The certificate * * * shall state the nature and extent of the physical defect, whether it is chronic or permanent, and the extent to which it is likely to render the alien incapable of pursuing a vocation or profession for which he has particular training or experience, or, if he has no such vocation or profession, incapable of performing ordinary physical or manual work.

§ 34.9 *Certificates and notifications; Class C.* A Class C certificate * * * shall be issued with respect to an alien who has a disease or defect other than those for which a Class A or Class B certificate * * * is required to be issued.

* * * * *

§ 34.13 *Re-examination; convening of boards; expert witnesses; reports.* (a) The Surgeon General, or when authorized, a medical officer in charge, shall convene a board of medical officers to re-examine an alien

(1) Upon the request of the Immigration Service for a re-examination by such a board, or

(2) Upon an appeal by the alien from a certificate of insanity or mental defect, issued at a port of entry.

(b) Such a board shall consist of three, when practicable, but in no case less than two, medical officers. In the event that a board consists of three medical officers, the decision of the majority thereof shall prevail.

(c) Re-examination shall include:

(1) A medical examination by the board;

(2) A review of all records submitted;

(3) Use of any laboratory or diagnostic methods or tests deemed advisable; and

(4) Consideration of statements regarding the alien's physical or mental condition made by a reputable physician after his examination of the alien.

* * * * *

(e) * * * an alien who has appealed from a certificate of insanity or mental defect shall be permitted to introduce at least one expert medical witness. * * *

* * * * *

(g) The findings and conclusions of the board shall be based on its medical examination of the alien and on the evidence presented to it and made a part of the record of its proceedings.

(h) The board shall report its findings and conclusions to the Immigration Service, and shall also give prompt notice thereof to the alien if the re-examination has been held upon his appeal. The board's report to the Immigration Service shall specifically affirm, modify, or reject the findings and conclusions of prior examining medical officers.

* * * * *

4. The Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 237, *et seq.*, provides in pertinent part:

* * * * *

Sec. 2 [5 U. S. C. 1001]. As used in this Act—

* * * * *

(e) License and licensing.

"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

* * * * *

Sec. 5 [5 U. S. C. 1004]. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved * * * (3) proceedings in which

decisions rest solely on inspections, tests, or elections; * * *

* * * * *

(c) Separation of Functions.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigating or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses * * *.

* * * * *

Sec. 7 [5 U. S. C. 1006]. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) Presiding Officers.—There shall preside at the taking of evidence (1) the agency,

(2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. * * *

* * * * *

Sec. 11 [5 U. S. C. 1010]. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, * * *.

* * * * *

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RWG-mtc

February 23, 1949

Honorable Charles Elmore Cropley
Clerk, United States Supreme Court
Washington, D. C.

Re: U. S. ex rel. May Johnson v. Watkins,
No. 506

Dear Mr. Cropley:

One of the issues in the above-entitled case is whether a board of special inquiry in alien exclusion proceedings must be composed of examiners appointed in accordance with Section 11 of the Administrative Procedure Act. In the Government's brief in opposition to certiorari (p. 23), we asserted that "Petitioner may not attack in this Court the judgment of the court below on grounds which were not presented to that court," and in Footnote 11 we quoted from petitioner's printed brief in the court below her express concession that Section 11 had no application to special boards of inquiry.

Mr. Gunther Jacobson, counsel for petitioner, has since advised me, and the United States Attorney confirms, that on argument in the court below petitioner withdrew this concession and filed with that court a supplemental typewritten brief in which she contended that Section 11 of the Administrative Procedure Act is applicable to boards of special inquiry.

In preparing the brief in opposition, this office was not aware that petitioner had withdrawn the concession made in her printed brief in the court below. In fairness to the petitioner, we must now concede that the issue was litigated in the court below and, therefore, is properly raised in her petition for certiorari. Since the Government's brief in opposition also treats this issue on its merits, we are satisfied that the issue has been presented fully to the Court.

Sincerely yours,

Philip B. Perlman,
Solicitor General

cc: Mr. Gunther Jacobson
36 West 44th Street
New York 18, New York

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 506

UNITED STATES OF AMERICA, EX REL. MAY JOHNSON,

Petitioner,

v.

W. FRANK WATKINS, DISTRICT DIRECTOR, ETC.

BRIEF FOR ASSOCIATION OF IMMIGRATION AND NATIONALITY LAWYERS, AMICUS CURIAE

JACK WASSERMAN,
Attorney for Association of Immigration and Nationality Lawyers, Amicus Curiae.

GASPARE CUSUMANO,
THOMAS M. COOLEY, II,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 506

UNITED STATES OF AMERICA, EX REL. MAY JOHNSON;

Petitioner,

v.

W. FRANK WATKINS, DISTRICT DIRECTOR, ETC.

BRIEF FOR ASSOCIATION OF IMMIGRATION AND NATIONALITY LAWYERS, AMICUS CURIAE

Introduction

The Association of Immigration and Nationality Lawyers is a national association of lawyers admitted to practice before the Immigration Service and the Board of Immigration Appeals. Some of its members are former officials of the Immigration Service and the Board of Immigration Appeals.

The Association is interested in advancing the science of the administration of law pertaining to immigration, nationality and naturalization.

We submit this brief and ask leave of the Court to file it as *amicus curiae* because of our interest in the issues involved in the present case.

Statement

Petitioner, May Johnson, arrived in the United States with an appropriate immigration visa on March 1, 1948. On March 11, 1948, two Public Health Service surgeons, Dr. Magnum and Dr. Pasquarelli, certified that she was "found afflicted with Mental Defective Class 'A' ". The certificate was not in affidavit form and contained neither a diagnosis nor a statement of the basis for the conclusion reached. The qualifications of the signers were not set forth. An unsuccessful appeal to a medical board was pursued in conformity with 8 U.S.C. 152. Thereafter hearings were held in New York before a Board of Special Inquiry composed of two immigration officials and a secretary-stenographer who acted as a member of the Board. The Board of Special Inquiry considered itself bound by the medical certificate and directed the exclusion of petitioner. The view that the Board of Special Inquiry was conclusively bound by the medical certificate and that the Administrative Procedure Act (5 U.S.C. 1004, 1010) was inapplicable has been affirmed below. (82 F. Supp. 36 and 170 F. (2d) 1009.) Judge Clark dissented "because of the inadequacy of the original certificate of the examining surgeons and total failure of the reviewing Board of Medical Officers to comply with the regulations."

ARGUMENT

I. The Board of Special Inquiry Was Not Conclusively Bound by the Medical Certificate

The First [1] and Ninth [2] Circuits have held that immigration officials are not bound by medical certificates in exclu-

[1] In *Billings* v. *Sitner*, 228 Fed. 315 (C. C. A. 1st, 1915) the board of special inquiry voted to exclude an immigrant "because it assumed that a certificate of the medical officer who had examined him under Section 17 of the Act to the effect that he was feeble-minded and his vision was defective, of itself bound the board to exclude, notwithstanding any other

sion proceedings but are required to exercise their "own judgment after considering not only the certificate but whatever other evidence there may be touching the alien's right to enter." These Circuits have so interpreted the Immigration Act of 1907 as well as the Act of 1917.[3] No major change was made as to the effect of medical certificates upon the passage of the 1917 Act. Section 10 of the Immigration Act of 1907 [4] was merely transposed into a proviso in the concluding part of Section 17 of the Immigration Act of 1917.[5] The language of the 1917 Act [6] reads exactly as does that of the 1907 Act [7] that medical certifications shall be for "*the information of the immigration officers.*"

In *United States* v. *Tod*, 1 F. (2d) 246 (C.C.A. 2d, 1924), the Second Circuit ruled that the determination of the

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evidence." The Circuit Court ruled that: "Such a construction would result in giving the inspecting medical officer, instead of the board, the power of final decision. Although immigration rule 17, subdivisions 4, 5 (note), state that the board is 'virtually compelled' to base its decision upon the certificate, we hold that it has no right to do so without exercising its own judgment after considering not only the certificate, but whatever other evidence there may be touching the alien's right to enter." *In Ex parte Joyce*, 212 Fed. 282, 284 (D. C. Mass. 1913) it was said: "The board of special inquiry is not bound by the opinion of the medical board, and ought, in reaching a decision, to consider all evidence which is brought to its attention." And in *Ex parte Liang Buck Chew*, 296 Fed. 182 (D. C. Mass. 1923) the court stated: "It is going a long way to say that the action of the medical officer is absolutely final, however capricious, unfounded and unreasonable it may be. If that had been the intention of the act, it would, I think, have been stated in explicit terms, but there is no such language. The status of the certificate appears to be established by section 16; it is made for the *information* of the immigration officers and the boards of special inquiry. The proviso of section 17 appears to mean that rejection because of disease is certified by a health officer, and to be in the nature of a limitation on the powers of the boards of special inquiry."

[2] *Gee Shew Hong* v. *Nagle*, 18 F. (2d) 248 (C. C. A. 9th, 1927).

[3] *Ex parte Liang Buck Chew*, 296 Fed. 182 (D. C. Mass. 1923) and *Gee Shew Hong* v. *Nagle*, 18 F. (2d) 248 (C. C. A. 9th, 1927) so interpret the 1917 Act.

[4] 34 Stat. pt. 1, p. 901.

[5] 39 Stat. 887.

[6] Sec. 16 of the 1917 Act, 39 Stat. 885.

[7] Sec. 17 of the 1907 Act, 34 Stat. pt. 1, p. 903.

medical officer was decisive. The judgment was reversed by the Supreme Court on confession of error by the Solicitor General (267 U. S. 571, October 1924 Term). The basis for the confession of error is set forth in a letter from the Department of Justice to the Secretary of Labor which reads as follows:

"January 13, 1925.

The Secretary of Labor,
Washington, D. C.

Re: United States ex rel. Pauline Fink versus
Tod, Commissioner of Immigration

SIR:

Pursuant to our conversation with Mr. White, Assistant Secretary of Labor, this Department came to the conclusion that it would be unwise and unjust for the Government to argue the appeal in this case.

Accordingly, it was decided that the Government should confess error, instead of arguing. Quite apart from considerations of humanity, it was felt that such a course was the only one which could be supported alike by sound law and sound policy.

The Solicitor General approved of this course; and when the case was reached in the Supreme Court late this afternoon, he, appearing on behalf of the Government, confessed error. In the course of the next few days, the Court will enter an order granting the writ of habeas corpus and finally discharging the relator from custody.

Respectfully,

For the Attorney General,

(Signed) WILLIAM J. DONOVAN,
Assistant Attorney General."

Gee Shew Hong v. *Nagle*, 18 F. (2d) 248 (C. C. A. 9th, 1927) which followed this confession of error and the accom-

panying Supreme Court ruling can hardly be overlooked. The Court stated as follows:

> "As already stated, the appellant challenged the order of exclusion upon the ground that the first certificate given by the medical officers was final and that the second examination and certificate were unauthorized and void. This contention finds support in the decision in *United States v. Tod* (C. C. A.) 1 F. (2d) 246, but a writ of certiorari was there granted, 266 U. S. 599, 45 S. Ct. 125, 69 L. Ed. 461; and the judgment was later reversed on confession of error by the Solicitor General, 267 U. S. 571, 45 S. Ct. 227, 69 L. Ed. 793. We cannot agree that the medical certificate has any such finality or conclusiveness as is claimed for it. The power to admit and exclude aliens is vested in a board of special inquiry, subject to the right of appeal, not in the medical officers of the Public Health Service. The certificate is furnished "for the information of the immigration officers and the board of special inquiry" and is evidence and nothing more. True, an excluding decision is not final unless based on the certificate of the medical officers, but the certificate itself may be challenged, at least by the alien."

We therefore submit that the same "sound law and sound policy" which led to the acknowledgment that a medical certificate was not conclusive in 1925 likewise leads to the same result today.

II. The Medical Certificate Is Insufficient

The Second Circuit has frequently commented upon the insufficiency of medical certificates in immigration proceedings.[8] The Supreme Court has had occasion to comment

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[8] *U. S. ex rel Minuto* v. *Reimer*, 83 F. (2d) 166 (C. C. A. 2d 1936). In *U. S. ex rel Papa* v. *Day*, 45 F. (2d) 435 (S. D. N. Y., 1930) where an alien was excluded because of tuberculosis, the court stated that: "Medical certificates, however satisfactory they may be as interdepartmental memoranda, are not satisfactory as a basis for judicial action, and that for

on the legal sufficiency of medical certificates in immigration proceedings under Section 9 of the Immigration Act of 1917 where an administrative penalty was imposed against a steamship company for the transportation of diseased or physically defective aliens. In *Lloyd Societa Anomina Per Azioni* v. *Elting*, 287 U. S. 329, 339 (1932) Justice Stone stated:

> "The medical opinions did not reveal the facts upon which they were based, and they were formulated by physicians who, so far as appears, were not apprised of the fact that three previous examinations of the nature described had been made. The detailed information as to those examinations which petitioner submitted to the Secretary in this case might reasonably have affected the *expert judgment of the physicians at Ellis Island*. In relying upon their opinion alone, without putting these additional facts before them, we think the Secretary acted arbitrarily and unfairly."

Expert opinion derives its probative force from the facts upon which it is predicated and these must be legally sufficient to sustain the opinion of the expert.[9] In the instant case the medical certificate did not state the evidence upon which the conclusion was based,[10] it did not indicate the

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such purposes medical evidence should preferably be taken in question and answer form, but, if not so taken, should at least be in the form of an affidavit, with the qualifications and experience of the doctor or doctors fully set forth, together with the reasons for the opinion at which they have arrived." See also: *U. S. ex rel Fong On* v. *Day*, 39 F. (2d) 202, 203; 54 F. (2d) 990, and in *U. S. ex rel Powlowec* v. *Day*, 33 F. (2d) 267, 268 (C. C. A. 2d, 1929) where deportation was based on the ground that an alien was afflicted with constitutional psychopathic inferiority, Judge Learned Hand remarked: "It is indeed another matter whether the certificate should not itself state the evidence upon which the conclusion is based, and what efforts have been made to ascertain the facts between entry and arrest. Certainly that is desirable."

[9] *Rogers* on Expert Testimony, Third Ed. (1941) p. 109.

[10] Nor does it even indicate the qualifications of the medical examiners. We believe that the medical examiners herein did not meet the statutory requirements which specify that they have special training in the diagnosis

nature, extent, character or the severity of the mental defect certified. The certificate is of no aid in determining the disabling extent of the appellant's condition. This deficiency was not supplied by producing the medical examiner as a witness.[11]

Significantly, the Government has realized the deficiencies of the type of medical certificate here under consideration.

On May 28, 1945 the Chairman of the Board of Immigration Appeals sought to have the Commissioner of Immigration revise the medical certificate to include an accurate description of the nature and extent of the alien's condition. The memorandum is annexed as Appendix A. No modification took place. On September 30, 1947, however, the Public Health Service revised its regulations to define a medical certificate as a document certifying *findings* with respect to an alien's condition. 42 C. F. R. 34.2(c). A Medical Appeal Board is required to report *findings* as well as conclusions to the Immigration Service. 42 C. F. R. 34.13(b). (It is obvious that the medical certificate herein contains a mere conclusion without any findings.)

On October 16, 1947, the Association of Immigration and Nationality Lawyers conferred with reference to the short-

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of insanity and mental defects (8 U. S. C. A. 152). In judicial proceedings where expert witnesses are called upon to render an opinion based upon their personal observation or examination, they are first qualified as a witness and the facts upon which the opinion is founded must all be stated, otherwise the witness might be giving an opinion which would have great weight with the jury upon a state of facts very different from those found by them in the case on trial. The value of the opinion in other words, must depend very largely upon the facts on which it is based. *Rogers* on Expert Testimony, Third Ed. (1941) pp. 80-81, 315, 323; *Hitchcock* v. *Burgett*, 38 Mich. 501, 507 (1878).

Although administrative agencies need not follow the strict rules of evidence prescribed for jury trials, it is erroneous to suppose that agencies do not as a result, observe some rules of evidence. *Final Report of the Attorney General's Committee on Administrative Procedure*, Senate Document No. 8, 77th Congress, 1st Sess. (1941) p. 70.

[11] See 8 C. F. R. 130.4 and *U. S. ex rel Minuto* v. *Reimer*, 83 F. (2d) 166 (C. C. A. 2d, 1936).

comings of medical certificates with officials of the Public Health Service and the Federal Security Agency (which acts as counsel to the Public Health Service). Following that conference, a letter was addressed to the President of our Association which read in part as follows:

"FEDERAL SECURITY AGENCY

Washington

Zone 25

December 5, 1947.

Mr. Abram Orlow
700 Bankers Securities Building
Philadelphia 7, Pennsylvania

DEAR MR. ORLOW:

This is with further reference to your letter of October 16. Following conferences within the Public Health Service and consultation with officials of the Immigration and Naturalization Service, Dr. Dunnahoo has requested me to advise you as follows on the points enumerated in your letter:

1. The Public Health Service plans to advise its medical examiners to include in the medical certificate, in addition to the designation of the physical or mental disease or defect found and the classification symbol, a brief indication of the data or findings upon which the evidence is based. . . .

(S.) GLADYS HARRISON,
Assistant General Counsel."

On September 17, 1948 the Board of Immigration Appeals reopened a case where an alien was certified as mentally defective to obtain "a new medical certificate on the new or revised basis indicated in the letter above" [12] and on January 3, 1949, Vernon T. Davis, Director of the Neuro-

[12] Matter of El Anid, File No. A-6231824.

psychiatric Service at Ellis Island acknowledged that the outstanding regulations "require that the medical diagnosis be shown on the certificate in addition to the legal terminology required by law" [13]

Considering the present administrative practice the possibility of error in diagnosis by physicians and the fact that mental shortcomings due to ignorance, language difficulties, or remedial physical causes may not be certified as a mental defect (42 C. F. R. 34.7(d)) it is of vital importance to require complete and full medical certificates in conformity with the applicable regulations.

III. The Hearing Failed to Comply With the Immigration Statute and the Administrative Procedure Act

The immigration statute (8 U. S. C. 153) provides that a Board of Special Inquiry "shall consist of three members, who shall be selected from such of the immigration *officials* in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards."

The regulations (8 C. F. R. 60.29) issued under the statute provide that (1) immigrant inspectors, (2) all other employees assigned to act as secretaries of boards of special inquiry and (3) other persons (preferably government employees) may serve as members of a Board of Special Inquiry. Persons within the third category must subscribe to an oath of office but those within the second category need not.

A. *Non-compliance with the statute*

It is submitted that the regulations are in excess of the statutory authorization. Secretaries of the Board are

[13] In a memorandum to the District Director at New York in the case of Maria Jose Rodriguez, N. Y. File No. 0300/154733 SI/PX & PU.

qualified stenographers and nothing more. They are not immigration officials [14] and therefore the instant Board was not properly constituted. It is submitted that *United States ex rel. Minuto* v. *Reimer*, 83 F. (2d) 166, 167-168 represents neither well established law on this point nor a correct statement of the law. In addition it should be observed that the record is barren of any showing that the secretary-stenographer, who acted as a Board Member was assigned to so act in the instant proceeding.

B. *Non-compliance with the Administrative Procedure Act*

1. NOTICE. (5 U. S. C. 1004(a)). Under Section 5 (a) of the Act "a party must be given ample notice of the legal and factual issues with due time to examine, consider and prepare for them. To make that possible the issues must be specified with reasonable particularity, for which purpose the statement of issues in general statutory language of delegations of authority to the agency would not be sufficient." (*Senate Document No. 248, 79th Congress, 2nd Session*, p. 261). *The Attorney General's Manual on the Administrative Procedure Act* page 46 *et seq.* is to the same effect. In addition the Act requires timely notice of "the time, place and nature" of the hearing and "the legal authority and jurisdiction under which the hearing is to be held." These requirements only apply to "cases of adjudication required by *statute* to be determined on the record."

The Immigration Service has concluded that the admission of an alien involves an adjudication required to be determined by statute on the record. "The procedure provided in

---

[14] Former Commissioner Carusi stated that "Each Board consists of three members, all of them *officers* of the Service except that in special cases at isolated ports, the Attorney General may determine it practicable to designate Government officials or other persons to serve on such Boards." *The Federal Administrative Procedure Act and the Administrative Agencies* (1947).

sections 16 and 17 of the 1917 Act was finally concluded by the Service in conjunction with the Department of Justice to be within the purview of the adjudication prescriptions of the Administrative Procedure Act. This was because of the provision found in Sections 16 and 17 of the 1917 Act which requires that an arriving alien not found clearly and beyond a doubt entitled to land shall be held for further examination by a Board of Special Inquiry. Such Boards are required to maintain records of their proceedings and the evidence taken by them and in cases in which appeal from their decision is allowable, the decision of the Attorney General is directed to be based upon the evidence adduced before the Board of Special Inquiry." (*House Report 2140, p. 4, 80th Congress, 2nd Session.*) The Immigration Service does not give timely advance notice of the legal and factual issues in exclusion cases and did not do so in the instant case. Only at the conclusion of the hearing was the alien advised of the grounds for detention and then in the conclusory language of the statute. The jurisdiction and the legal authority under which the Board of Special Inquiry operates is never set forth in any notice of hearing. It has been concluded that under the Administrative Procedure Act the Service "will have to clarify its practices with respect to the giving of notice to the alien of the agency hearing and the reasons therefor." (56 Yale Law Review 700). The Immigration Service in the instant case did not comply with 5 U. S. C. 1004 (a).

2. Separation of Functions is required by Section 5 (C) [5 U. S. C. 1004 (c)] of the Administrative Procedure Act where there is a statutory hearing. Excepted *inter alia*, are the top agency or members thereof and initial applications for a license. Hearing officers "may not hold ex parte private conferences, they may not be subject to the supervision of prosecuting officers, and prosecuting officers may

not participate in decisions except as witnesses or counsel in public proceedings . . . The purpose of the section is to assure that no investigating or prosecuting officer shall directly or indirectly in any manner influence or control the operations of hearing and deciding officers . . . The separation of functions here required must be reflected in the rules of organization and procedure issued pursuant to section 3(a)." (*Senate Document No. 248, 79th Congress, 2nd Session,* pp. 361, 262).

"As a practical matter this means that an agency's hearing examiners should be placed in an organizational unit apart from those to which investigative and prosecuting personnel are assigned, and that the examiners' unit should be under the supervision only of the agency itself or of agency officers who exercise no investigative or prosecuting functions." (*Attorney General's Manual on the Administrative Procedure Act,* pp. 55-56.)

It is clear that the Immigration Service did not comply with the provisions requiring the separation of functions. District Directors and other personnel who are concerned with investigation and prosecution supervise Boards of Special Inquiry. There is no organizational unit of hearing officers set apart and responsible to agency officers, who exercise no prosecuting functions. The separation of functions has not been published in the form of rules and regulations pursuant to section 3 of the Act. Can the Immigration Service claim exemption from these requirements?

The Government admits that a statutory hearing is held but asserts the novel view that the admission of aliens "seemed to fall within the (exempting) provisions of section 5 (c)relating to initial licenses" (*House Report 2140, 80th Congress, 2nd Session,* p. 4). Until now, neither the Courts nor the Government have ever referred to the appli-

cation for admission of an alien as an application for an "initial license." Generally the initial permission to enter the United States is granted by an American Consul abroad. The Service merely rechecks the alien's admissibility. There is no provision in our immigration statutes authorizing the Commissioner to issue licenses to aliens seeking admission to our shores. The statutes do not contemplate a licensing procedure. Furthermore, the Immigration Service does not treat an alien, once admitted, as though he has received a license. Section 9 of the Administrative Procedure Act requires notice to the licensee prior to revocation of a license with an opportunity to achieve compliance with the requirements of law. On the contrary, the new visitors regulations consider the visitors' visa cancelled forthwith upon evidence of an intention by words or action to violate the terms of admission. (Federal Register, May 15, 1948; 8 C. F. R. 119.5(3)).

The separation of the prosecuting from the adjudicating function of the Immigration Service was advocated by the Wickersham Commission during the Hoover Administration. (5 National Commission on Law Enforcement, pp. 157, 158). Later Dean Van Vleck (The Administrative Control of Aliens, 1932, pp. 247-250) made similar suggestions. In 1940, the Secretary of Labor's Committee on Administrative Procedure composed of Professors Marshall Dimock, Henry M. Hart and John McIntire recommended that "presiding inspectors be relieved of their present duties of presenting the case against aliens and be confined entirely to the duties customary for a judge." (pp. 81 and see pp. 49 et seq.).

In the light of this history, and the basic purpose of the Administrative Procedure Act, it is proper to conclude that the Immigration Service should "reorganize to comply with the provisions of Section 5 (c) requiring separation of functions," 56 Yale Law Journal at pp. 701 and 702.

3. HEARING EXAMINERS. Section 11 of the Administrative Procedure Act (5 U. S. C. 1010) requires specified hearing examiners in cases of adjudications required by statute. These hearing examiners are to be assigned to cases in rotation, perform no inconsistent duties, and are to receive compensation prescribed not by the agency but by the Civil Service Commission. Section 7 (5 U. S. C. 1006) of the Act exempts from Section 11 "specified classes of proceedings . . . by or before boards or other officers specially provided for by or designated pursuant to statute."

The section 7 exemption "does not mean that agencies are authorized—whether pursuant to the express authority of other statutes or not—to avoid the examiner system—set up in this bill . . . by assigning general employees or attorneys to hear cases individually or as boards. In short, unless the agency or its members or *some specially qualified statutory officer* hears the case, an examiner qualified under section 11 of this bill must do so." (*Congressman Walter, Senate Document No. 248, 79th Congress, 2nd Session*, p. 364. See also p. 268 and *Attorney General's Manual, supra* pp. 71-72).

56 Yale Law Journal 701 states:

> "The committee reports indicate that the exemption should be strictly construed, and in particular that statutory provisions authorizing the use of employees or attorneys generally should not be considered authorization for exemption. However, some statutory boards listed by the Attorney General in the Senate Report as examples of the exempted class seem to fall within the group which the reports indicate is not exempted. The apparent conflict can only be resolved on the grounds that the statutes setting up these boards did not authorize the use of employees generally but rather specified that their members should be selected from among eligible employees designated as such by the agency head."

The article concludes that exemption can be granted to exclusion proceedings only on the basis that members of Boards of Special inquiry were selected not from employees generally but because of their special qualifications.

Boards of Special Inquiry were first provided by statute in 1893. (27 Stat. 569). In 1911 a Congressional Commission completed a report of our immigration system and stated:

> "Boards of Special Inquiry are one of the most, if not the most, important factors in the administration of the immigration laws. . . . The boards exercise a power which if not properly used may result in injustice to the immigrant or, through the admission of undesirable aliens, in harm to the country. It is important, therefore, that these boards should be composed of unprejudiced men of ability, training, and good judgment. . . . At all the important ports the boards of special inquiry are composed of immigrant inspectors, who generally are without judicial or legal training. . . . In justice to the immigrant, and to the country as well, the character of these boards should be improved. They should be composed of men whose ability and training fit them for the judicial functions performed, and the provisions compelling their hearings to be separate and apart from the public should be repealed." (I Reports of the Immigration Commission, pp. 32-33; 1911).

See to the same effect:

Van Vleck, The Administrative Control of Aliens (1932) at pp. 247, 46, 67.

Report of the Secretary of Labor's Committee on Administrative Procedure (The Immigration and Naturalization Service) by Marshall Dimock, Henry M. Hart and John McIntire (1940) at pp. 49 *et seq.*)

The legislative representative of the Association of Immigration and Nationality Lawyers testified in August of

1948 before the Senate Sub-Committee on Immigration with reference to this problem as follows:

> "What was said in 1911 has been repeated through the years and is true almost to the word today. Boards of Special Inquiry at some ports consist of an immigrant inspector, a customs man and a stenographer. In New York it's a little better—there are two inspectors and a stenographer who casts her vote with the chairman of the board. The situation in deportation proceedings is not much better. How can you expect low-paid non-lawyers to preside at hearings, weigh fine points of evidence, citizenship, foreign law and exercise quasi-judicial functions. Many of its good lawyers have left the Immigration Service. If Section II of the Administrative Procedure Act is applied to its proceedings, the Service will be able to retain its good lawyers and attract others. It will be compelled to raise the salaries of hearing examiners and only properly qualified men will preside in judgment in the important process of deportation or exclusion.
>
> "We therefore urge that the Administrative Procedure Act be retained and that if doubt exists as to its application to immigration proceedings, it be made to apply by specific statutory provision."

In the instant case, not a single member of the Board of Special Inquiry was a lawyer. The immigrant inspectors who sat were not required to have any special training. The secretary who sat as a Board member merely had stenographic experience in the Immigration Service. The Government's assumption in its brief in opposition to the petition (p. 25) that "Miss Fairbanks may have had extensive experience as a member of such boards and, therefore, may be better qualified to so act than some immigrant inspectors" does not bespeak well of the qualifications of immigrant inspectors. The government's implication relative to "Miss" Fairbanks' qualifications is as incorrect as its knowledge of the sex of the stenographer who recorded

the minutes of the hearing. A. P. Fairbanks is a male secretary.

As long as stenographers can sit as Board of Special Inquiry members—and this is the practice rather than the exception—individuals without special qualifications other than that possessed by employees generally, are performing the duties of hearing examiners. Boards so composed are not within the exemption of Section 7 of the Administrative Procedure Act.

The purpose of the Administrative Procedure Act was to bring fair hearing procedure into the administrative process. The requirements of adequate notice of the issues, separation of functions and independent hearing examiners were reforms advocated for some time in the exclusion and deportation of aliens. Law and policy alike indicate the soundness of the position taken by appellant.

Conclusion

The judgment below should be reversed because the medical certificate was not conclusively binding and because of its insufficiency. Appellant was not accorded a fair hearing in view of the failure of the Government to conform with the provisions of the Administrative Procedure Act.

Respectfully submitted,

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GASPARE CUSUMANO,
THOMAS M. COOLEY, II,
Of Counsel.

APPENDIX A

May 28, 1945.

To: Ugo Carusi, Commissioner, Immigration & Naturalization Service.

From: Thos. G. Finucane, Chairman, Board of Immigration Appeals.

In re: Medical certificates.

The Board has experienced considerable difficulty with regard to the sufficiency of medical certificates submitted in immigration proceedings and executed by physicians of the Public Health Service.

The Courts have had occasion to comment on this subject and have indicated their displeasure with the insufficiency of medical certificates submitted in immigration matters. See *United States ex rel Minuto v. Reimer*, 83 F. (2d) 166 (C. C. A. 2d 1936); *United States ex rel Papa v. Day*, 45 F. (2d) 435 (S. D. N. Y. 1930); *United States ex rel Fong On v. Day*, 39 F. (2d) 202, 203 (S. D. N. Y. 1930); *United States ex rel Powlowec v. Day*, 33 F. (2d) 267, 268 (C. C. A. 2d 1929).

In order to comply with these decisions and with section 130.4 of Title 8 C. F. R., the Board suggests that the form of the medical certificate be revised as set forth in the attached proposal. We would appreciate your comments on the attachment.

Attachment.

U. S. Department of Justice
Immigration and Naturalization Service
Medical Certificate

State of .....
County of ..... : ss.
Port of: .....

1. Name of alien: ..... 2. Date of arrival:
3. Steamship: ..... 4. Age:
5. Sex: ..... 6. Occupation:
7. History of case: .....

8. Give an accurate and complete description of the nature and extent of alien's defective condition based upon your personal observation:

9. Alien's complaints, (if any):
10. Present diagnosis and detailed reasons thereof:

11. Did condition exist on date of arrival?
12. If suffering from a disease or tuberculosis, was it in a contagious stage at time of arrival?
13. Is the defect of a temporary or permanent nature? (State prognosis.)

14. To what extent, if any, does the alien's defective condition affect his ability to pursue his usual occupation?

15. Does the alien's defect affect his ability to earn a living?

This is to certify that the above-named person was examined this day of and is found to have the condition diagnosed above.

(Signed) Surgeon, U. S. Public Health Service.
Licensed to practice on (date) Specialty
No. of years
(Signed) Surgeon, U. S. Public Health Service.
Licensed to practice on (date) Specialty
No. of years
Sworn to before me this day of , 19

Immigrant Inspector.